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No. 82-2120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et al.,

Petitioners,

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

Respondents.

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 22, 1983
CERTIORARI GRANTED OCTOBER 31, 1983

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COMPLAINT (NOV. 26, 1976)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., URSULA J. SMITH, Parents, Guardians and Next Friends of THOMAS F. SMITH, III, and THOMAS F. SMITH, III.	)	
-vs-	)	C.A. 76-0510
WALTER CURTIN, LOUIS C. GOODRICH, JOSEPH L. JACINTO, LOUIS J. KOLODZIEJ, EDWARD P. MOUSSEAU, and WILLIAM J. O'COIN, JR., in their capacity as members of the School Committee of the Town of Cumberland	)	

C O M P L A I N T

1. This action arises under the Constitution and laws of the United States; more particularly, the Due Process Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

2. The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

3. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(3).

4. Plaintiffs, THOMAS F. SMITH, JR. and URSULA J. SMITH are husband and wife, residents of Cumberland, Rhode Island and parents of THOMAS F. SMITH, III. THOMAS F. SMITH, III is an exceptional, multi-handicapped person, 8 years of age, and in need of special education services.

5. The defendants are the duly elected members of the School Committee of the Town of Cumberland.

6. Plaintiff, THOMAS F. SMITH, III, suffers from both physical and emotional handicaps and has a long history of being unable to fit into any educational environment provided by the defendant School Committee.

7. After repeated failures to find an appropriate educational placement the Defendant School Committee at the urging of the

plaintiffs, THOMAS F. SMITH, III's parents, agreed to place him in a day program for children afflicted with his particular handicap at Emma Pendleton Bradley Hospital, East Providence, Rhode Island.

8. Said placement was made December 6, 1975.

9. Plaintiff, THOMAS F. SMITH, III, received and benefited from the many services of the special program at Bradley Hospital in which he was enrolled. In fact, this program was and is the only educational program capable of meeting the said plaintiff's special needs.

10. The Defendant School Committee is charged by law with the responsibility to provide a suitable, appropriate education to handicapped persons such as the plaintiff, THOMAS F. SMITH, III.

11. While your plaintiff, THOMAS F. SMITH, III, was enrolled in the said program for the school year commencing September 8,

1976 the defendants have refused to continue funding of his placement in the program.

12. Defendants, acting under color of state law (Title 16 Ch. 24 - General Laws of Rhode Island) as agents of the State Board of Regents have caused or are about to cause, the termination of THOMAS F. SMITH, III's placement at Bradley Hospital by withdrawing their funding for same.

13. Defendants have notified the plaintiffs of the proposed change as required by Article IX - Procedural Safeguards of the Regulations - Education of Handicapped Children, adopted by the State Board of Regents pursuant to an agreement reached in the case of;

THE RHODE ISLAND SOCIETY FOR AUTISTIC CHILDREN, INC., et als	)	c.a.
vs	)	file
ROBERT RIESMAN, As Chairman of The Rhode Island State Board of Regents, et als	)	no. 5081

now pending in this Court.

(A copy of Article IX - Procedural Safeguards is annexed hereto as "Exhibit A")

14. Plaintiffs have appealed the decision of the Superintendant of Schools, acting under color of state law and as agent for the defendants, dated November 5, 1976 (A copy of which is annexed hereto as Exhibit B) pursuant to Article IX - Procedural Safeguards. The force and effect of the said decision is to deny any further responsibility to fund THOMAS F. SMITH III's current placement at Emma Pendleton Bradley Hospital, which assuredly will result in his termination there.

15. Defendants failure to continue THOMAS F. SMITH's current placement until his appeal to the defendants, acting as the School Committee of the Town of Cumberland, can be heard and until all further proceedings pursuant to G.L. R.I. (1956) §16-39-1 et seq are completed is violative of plaintiffs' due process rights as guaranteed

by Section 1 of the Fourteenth Amendment to the Constitution of the United States, as embodied in Article IX - Procedural Safeguards - Section 4.0 Paragraph 4.1.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That THOMAS F. SMITH, III be immediately reinstated in the program at Emma Pendleton Bradley Hospital at the expense of the defendants.

2. That THOMAS F. SMITH, III be maintained in said program during the pendency of any hearing conducted pursuant to Article IX - Procedural Safeguards of the Regulations - Education of Handicapped Children and Title 16 Chapter 39 of the General Laws of Rhode Island, at the expense of the defendants, and

3. For such other and further relief as may be just in the circumstances of this case.

By their attorneys
OSTER, ESPO, FAY & GROFF
936 Smithfield Avenue

Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

DATED: November 26, 1976

[Jurat omitted in printing.]

EXHIBIT A TO THE COMPLAINT: REGULATIONS OF THE RHODE ISLAND BOARD OF REGENTS GOVERNING SPECIAL EDUCATION OF HANDICAPPED CHILDREN

Regulations - Education of Handicapped Children (adopted December 19, 1963 and amended June 15, 1972) are hereby amended by adding IX to the first section entitled General Regulations of the Board of Regents Governing Special Education of Handicapped Children.

IX. Procedural Safeguards

1.0 LEA Responsibility

1.1 Each LEA shall establish and maintain procedures to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provisions of free appropriate education by such agency. Such procedures shall include but need not be limited to:

1.1.1 Written prior notice to the parent or guardian whenever the LEA proposes to initiate or change or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate education.

1.1.1.1 Such notice shall be sent by certified mail to the last known address of the parent.

1.1.1.2 It shall include a description of the action proposed and of the reason for such action and of the safeguards afforded to parents or guardians and the procedures by which they may avail themselves of these safeguards.

1.1.1.3 It shall include a form to be signed and returned by the parents giving consent or objecting to the proposed action by the LEA or requesting a conference with the Supervisor of Special Education to dis-

cuss the proposed action.

1.1.1.4 It shall inform the parents that no action will be initiated by the LEA without consent of a parent, but that failure to respond within ten school days will be deemed to be consent, and the action proposed will then be initiated by the LEA.

1.1.1.5 It shall contain specific information - name, address and telephone number - concerning the LEA staff person who will assist the parents in availing themselves of all safeguards, and shall be written, unless it is clearly not feasible to do

so, in the parents spoken language.

1.1.1.6 It shall inform the parents that all of the relevant records with respect to the identification, evaluation and placement of the child shall be made available for the parents to examine. It shall further inform the parents of their right to obtain (at their expense) an independent evaluation of the child and that a listing of all public and private agencies performing such evaluations will be provided by the school department upon request.

1.1.2 A procedure to protect the rights of the child whenever the parents or

guardians of the child are not known, unavailable or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State Education Agency or Local Education Agency which is involved in the education or care of the child) to act as surrogate for the parent or guardian.

1.1.3 An opportunity for a conference with the local Supervisor of Special Education no later than ten school days after the request.

1.1.3.1 Immediately following the conference, the Supervisor of Special Education shall submit a recommendation in writing to the Superintendent of Schools who shall review the recommendation and shall notify the parents of his decision within ten days after the conference.

1.1.4 An opportunity to appeal to the School Committee if the decision of the Superintendent is not acceptable to the parents.

1.1.4.1 Such appeal shall be submitted in writing within ten school days.

1.1.4.2 A hearing shall be held by the School Committee or its designated hearing officer and a decision shall be given not later than thirty days after the appeal.

1.1.4.3 A copy of the decision shall be mailed to the parents, together with a notice informing them of their right to and procedure for further appeal.

2.0 Procedures for Appeal from Decision of LEAs

2.1 A parent or guardian not satisfied with the decision of the School Committee may continue his appeal under provisions of Chapter 16-39 of the General Laws of Rhode Island, 1956, as Amended.

3.0 Rights Related to Hearings

3.1 Any party to any hearing pursuant to Sections 1.1.4 and 2.1 above shall be accorded:

3.1.1 The right to prior notice of the time and place of the hearing;

3.1.2 The right to be accompanied and represented by counsel and by individuals with appeal knowledge or training with respect to the problems of handicapped children;

3.1.3 The right to present evidence and confront and cross-examine witnesses;

3.1.4 The right to a written or electronic verbatim record of such hearings, at cost to the party;

3.1.5 The right to written findings of fact and decision.

4.0 Placement of Child During Pendency of Proceedings

4.1 During the pendency of any proceedings conducted pursuant to 1.0 and 2.0 above, unless the SEA or the LEA and the parents or guardians otherwise agree, the child shall remain in his/her current educational placement, or, if applying for initial admission to a public school, shall, with the consent of the parent or guardian, be placed in a regular class in the public school program until all such proceedings have been completed. The sole exception in either case shall be when the Superindent upon substantial evidence determines that the child will be an immediate danger to himself or to others. Any such decision may be contested through the proceedures in 1.0 and 2.0 above.

5.0 Procedure in the Event that Parents or Guardians Withold Consent

5.1 In the event that a parent or guardian withholds consent to change the identification, evaluation or educational placement of a child, the Supervisor of Special Education shall arrange a meeting with the parent or guardian as promptly as possible at a time and place convenient to the parent or guardian, at which the Supervisor of Special

Education shall explain the reason for the change. Not less than three distinct efforts shall be made by written or telephonic communication to arrange such meeting.

5.2 In the event that a parent or guardian, after receipt of notice of the time and place of the meeting, shall fail or refuse to attend, then the parent or guardian's withholding of consent shall be deemed insuffient and the change proposed shall be accomplished, provided the parent or guardian shall, thereupon, be notified in writing of the right to a conference and a hearing in accord with Sections 1.1.3 and 1.1.4 above.

6.0 Rights of Parents to a Hearing

6.1 Notwithstanding any time limits prescribed above, parents or guardians have the right to request a conference with the local Supervisor of Special Education at any time when they believe that a decision substantially altering the educational placement of their child has been made. If such conference does not result in a recommendation acceptable to the parents, the procedure provided by 1.1.4 may be initiated.

7.0 Effective Date

7.1 This Section shall become effective upon adoption by the Board of Regents for Education.

Effective Date: June 14, 1976

EXHIBIT B TO THE COMPLAINT: LETTER DATED NOVEMBER 5, 1976 TO PLAINTIFFS' LAWYER FROM THE SUPERINTENDENT OF SCHOOLS STATING THAT THE EDUCATION OF PLAINTIFF THOMAS F. SMITH III WILL NO LONGER BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE

Town of Cumberland
Rhode Island

* * * * * *

SCHOOL DEPARTMENT
1512 MENDON ROAD - CUMBERLAND
02864

November 5, 1976

George M. Prescott, Esquire
936 Smithfield Avenue
Lincoln, Rhode Island 02865

Re: Thomas F. Smith III
6 Aurora Drive
Cumberland, Rhode Island 02864

Dear Mr. Prescott:

I am responding to your letter of October 21, 1976.

The Cumberland School Committee does not propose a change in placement for Thomas F. Smith III. The Committee believes that Emma Pendleton Bradley Hospital provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him.

Thomas is an emotionally disturbed child as defined in Section 40.1-7-4 of the General

Laws of Rhode Island, 1956, As Amended, and as such, by virtue of Chapter 7 of Title 40.1 of the General Laws, his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.

If you desire a hearing before the School Committee, will you please let me know in writing and I will notify you of the date of the hearing.

Very truly yours,

/s/
Robert G. Condon
Superintendent of Schools

RGC:ps

TEMPORARY RESTRAINING ORDER: DEFENDANTS ENJOINED FROM TERMINATING THE PAYMENT FOR AND PLACEMENT OF PLAINTIFF THOMAS F. SMITH III IN A SPECIAL EDUCATION PROGRAM AT BRADLEY HOSPITAL (DEC. 9, 1976)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et als.	)	
	)	
-vs-	:	C.A. No.
	)	76-0510
WALTER CURTIN, et als.	)	

TEMPORARY RESTRAINING ORDER

Upon the verified Complaint filed herein and upon representations made by counsel during a preliminary hearing held on Plaintiffs' Motion For Preliminary Injunction and Temporary Restraining Order on December 8, 1976 at 4:30 P.M.; and it appearing therefrom that defendants unless restrained and enjoined forthwith may terminate the placement of the minor plaintiff herein,

Thomas F. Smith, III, in a special education program at Emma Pendleton Bradley Hospital, East Providence, Rhode Island; and it being manifest that any such termination would cause immediate and irreparable injury to said plaintiff and that such act would alter the status quo existing between plaintiffs and defendants before a hearing for a preliminary injunction could be held, therefore;

IT IS HEREBY ORDERED that defendants, acting as the School Committee of Cumberland, Rhode Island are temporarily restrained pursuant to Rule 65 of the Federal Rules of Civil Procedure from failing to maintain the minor plaintiff, Thomas F. Smith, III in the special education program in which he is now enrolled at Emma Pendleton Bradley Hospital, East Providence, Rhode Island until plaintiffs can be heard on their Motion For Preliminary Injunction.

Said Motion is hereby scheduled for hearing on December 20, 1976 at 3:00 P.M.

/s/ Raymond J. Pettine
Chief United States District Judge

DATED: December 9, 1976

PRELIMINARY INJUNCTION: DEFENDANTS REQUIRED TO CONTINUE TO MAINTAIN AT THEIR EXPENSE THE SPECIAL EDUCATION PLACEMENT OF PLAINTIFF THOMAS F. SMITH III IN A SPECIAL EDUCATION PROGRAM AT BRADLEY HOSPITAL (DEC. 22, 1976)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et als.	)	
	)	
-vs-	)	C.A. NO.
	)	76-0510
WALTER CURTIN, et als.	)	

PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiffs' motion for a preliminary injunction, and the court having considered the facts of this case as contained in the verified complaint and the stipulations of counsel for both parties made in open court, and it appearing to the court after due deliberation that the defendants are about to commit the acts set forth in the verified complaint, to the immediate and irreparable injury of the minor plaintiff, and the court having made its findings of fact and conclusions of law,

IT IS HEREBY ORDERED, that the minor plaintiff, Thomas F. Smith, III, shall be maintained at the Day Hospital Program at Emma Pendleton Bradley Hospitl, East Providence, Rhode Island at the expense of the defendants, acting as the School Committee of Cumberland, Rhode Island until a hearing which is currently scheduled for January 7, 1977 before the said school committee is held, and any and all appeals therefrom, allowed pursuant to Article IX - Procedural Safeguards of the Regulations Education of Handicapped Children of the Rhode Island Board of Regents and G.L.R.I. §16-39-1, et seq., are heard and determined.

This order is effective as of December 20, 1976 at 3:44 P.M.

/s/ Raymond J. Pettine
Chief United States District Judge

DATED: December 21, 1976

MEMORANDUM AND OPINION: PRELIMINARY INJUNCTION CONTINUED SO AS TO REQUIRE ON-GOING PLACEMENT AT DEFENDANTS' EXPENSE OF PLAINTIFF THOMAS F. SMITH III IN A SPECIAL EDUCATION PROGRAM AT BRADLEY HOSPITAL PENDING THE CONCLUSION OF ADMINISTRATIVE APPEALS (JAN. 17, 1977)

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et als.	)	
	)	
v.	)	C.A. No.
	)	76-0510
WALTER CURTIN, et als.	)	

MEMORANDUM

Plaintiffs, an eight year old multi-handicapped boy and his parents, contend that the defendants, the duly elected members of the Cumberland School Committee (hereinafter the Committee), have failed to observe the requirements of Article IX, Paragraph 4.1 of the General Regulations (for) Education of Handicapped Children, thereby violating their due process rights.

Jurisdiction is correctly based on 28 U.S.C. §1331 and 28 U.S.C. §1343. The cause of action is created by 42 U.S.C. 1983. A temporary restraining order is in effect, a hearing has been held, and the matter is now before the Court on application for preliminary injunction.

Thomas F. Smith, III, suffers from both physical and emotional handicaps, and has a long history of being unable to fit into the educational environment provided for him. Tommy walks with the aid of leg braces and crutches due to problems created by cerebral palsy which have affected him since birth. He is currently successfully enrolled in a state approved "special education program" at the Emma Pendleton Bradley Hospital.[1/] He was placed in the day program at the Bradley Hospital on December 6, 1975 by the defendant members of the school committee. It is not disputed that Tommy has benefited from the many services and programs in the day

program. Indeed, the Superintendent of Schools for Cumberland has written to the Smiths that "The Committee believes that Emma Pendleton Bradley Hospital provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him."

Nevertheless, the Committee has informed the Smiths that it has decided to withdraw that portion of the funding which it feels is not its responsibility for Tommy's placement at Bradley Hospital. The Committee reasons that, since Tommy is an "emotionally disturbed" child as defined in R.I.G.L.§40.1-7-4 (Supp. 1975), his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals (MHRH) by virtue of Chapter 7 of Title 40.1 of the General Laws of the State of Rhode Island.[2/] The Smiths have availed themselves of the Committee's offer of a hearing scheduled for January 7, 1977, but the

Committee has refused their request to delay the funding termination pending the hearing and any available appeals.

Plaintiffs make two related constitutional claims. First, they contend that applicable state regulations require that Tommy's placement at Bradley Hospital continue until all state process is exhausted. They argue that defendants deprive them of due process by failing to follow these regulations. Second, assuming arguendo that the regulations do not apply to the facts of this case, they contend that due process requires that termination of Tommy's benefits cannot precede final determination of his right to such benefits under the rule of Goldberg v. Kelley, 397 U.S. 254 (1970).

On application for preliminary injunctive relief, of course, the court must find that plaintiffs have a likelihood of succeeding on the merits and will suffer irreparable harm without injunctive relief. The Court

must also weigh the harm to defendants should the injunction issue, and consider the public interest. See, e.g., Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958).

It is elementary that government must follow the law just as private citizens must. The government's failure to treat its citizens in accordance with applicable procedures, specified by law, deprives those citizens of due process of law. Vitarelli v. Seaton, 359 U.S. 535 (1959); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Therefore, if defendants are bound by the regulations in questions, their failure to follow them would constitute a deprivation of due process cognizable under 42 U.S.C. §1983.

Paragraph 4.1 of Article IX of the General Regulations -- the Education of Handicapped Children provides:

4.0 Placement of Child During Pendency of Proceedings

4.1 During the pendency of any proceedings conducted pursuant to 1.0 and 2.0 above, unless the (Committee) and the parents or guardians otherwise agree, the child shall remain in his/her currrent education placement, or, if applying for initial admission to a public school, shall, with the consent of the parent or guardian, be placed in a regular class in the public school program until all such proceedings have been completed. The sole exception in either case shall be when the Superintendent upon substantial evidence determines that the child will be an immediate danger to himself or to others. Any such decision may be contested through the procedures in 1.0 and 2.0 above.

Defendants contend that the present controversy over their continued funding of Thomas is not a proceeding covered by paragraphs 1.0 and 2.0.[3/] According to their reasoning, paragraphs 1.0 and 2.0 cover only proceedings where the Committee and parents disagree to the proper placement for a child. Since the Committee agrees that Bradley is the proper

placement, but disagrees that it is responsible for continued funding of the placement, it argues that its decision to terminate funding does not create a paragraph 1.0 or 2.0 proceeding, and that the continuence of placement provision of paragraph 4.1 is inapplicable.

The defendants' contention is without merit. The procedural safeguards mandated by regulation are applicable:

> whenever the LEA (local education agency, e.g., the school committee) proposes to initiate or change or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate education.[4]/
> (emphasis added)

The decision of the Committee to terminate funding because it believes it is no longer responsible for Thomas' education fits precisely into the category of situations covered by paragraph 4.1 (incorporating paragraphs 1.0 and 2.0), in which placement must be continued pending final resolution of the

problem by state authorities, since the Committee "proposes to ...change...the provision of a free appropriate education."

The reason why the Committee proposes to change Tommy's educational program is not relevant. The regulations do not contain an exception to the continued placement provision for changes based on a school committee's jurisdictional disputes with MHRH. The policies supporting the continuance of placement regulation do not lose force depending on the nature of the school committee's justification for a change. The harm to the child resulting from mistaken removal from a placement once deemed "appropriate" is the same whether the Committee has a dispute over its responsibility vis a vis another state agency or a dispute over the appropriateness of the placement. In either case, a Handicapped child's carefully achieved progress and hard won benefits may be lost or jeopardized by by wrongful removal. If the school

committee later turns out to have been mistaken, the child cannot be reimbursed for the time and continuity he has lost.[5] Here, by contrast, should the Committee eventually prevail, it can seek reimbursement of its funds from MHRH.[6]

What has just been said regarding the probability of success on the merits also suffices to demonstrate where the balance of the equities lies in this case. The harm Tommy would suffer were he to be forced out of a program which all parties agree is appropriate and beneficial would far outweigh the temporary inconvenience suffered by the town in funding his program, subject to later reimbursement from MHRH should it prevail. The public interest seems to lie heavily on Tommy's side. The legislature has declared that strong public policy supports the provision of the best possible education and training to children with Tommy's handicaps, so that they will have an opportunity to

become self-supporting and not dependent on the help of their fellow-citizens.

The requirements for the issuance of a preliminary injunction are satisfied. Plaintiffs will prepare an order, and submit it to the court, directing that Thomas F. Smith III be maintained in the day program at Emma Pendleton Bradley Hospital at defendants' expense during the pendency of any hearing conducted pursuant to Article IX Procedural Safeguards of the Regulations Education of Handicapped Children and Title 16 Chapter 39 of the General Laws of Rhode Island.

/s/ Raymond J. Pettine
Chief Judge
January 17, 1977

FOOTNOTES

1/ The duties of the local school committees to provide for special education are created by Title 16, Chapter 24 of the General Laws of Rhode Island (1969 reenactment, Supp. 1975). The General Regulations of the State Board of Regents Governing the Special Education of Handicapped Children, implementing R.I.G.L. §16-24-1, et seq, are issued pursuant to authority granted in R.I.G.L. §16-24-2. Such regulations have the force of law. Article I of the General Regulations provides:

I. Definitions

A. Exceptional Handicapped Children -- is defined to include children who are emotionally handicapped, mentally retarded (educable, trainable, severe and profound); physically handicapped (health impaired, hearing, homebound, neurologically, orthopedically, speech, aphasic, and visually); and multi-handicapped. A child so defined shall be eligible for special education upon the attainment of his third birthday until such time as he has completed high school or reaches the age of twenty-one whichever comes first.

B. Special Education -- is defined as educational facilities, materials,

evaluative services, therapeutic services, and instruction which are especially designed and operated by personnel with special educational qualifications, to meet the particular needs of exceptional handicapped children.

Tommy is both "emotionally handicapped" and "physically (orthopedically) handicapped", and therefore "multi-handicapped".

2/ R.I.G.L. §40.1-7 (3) provides in relevant part:

> Responsibility of department.--The department is charged with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children...and to take the initiative in all matters involving the interests of such children where adequate legal provision therefore has not already been made....

"Care and treatment" are defined in R.I.G.L. §40.1-7-4(1) as follows:

> "Care and treatment" means medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or

special education programs under the jurisdiction of the board of regents for education. (emphasis added.)

The responsibilities of MHRH regarding emotionally disturbed children are set forth in some detail by the Rhode Island Supreme Court in Naughton v. Goodman, No. 75-25 Appeal (October 5, 1976). That decision makes it clear that the responsibility of MHRH to provide "care and treatment" for an "emotionally disturbed child" does not include funding any special education programs under the jurisdiction of the Board of Regents of Education. Id., slip op. at 4. A child may be both "emotionally handicapped" (the responsibility of the local school committees and the Board of Regents of Education) and "emotionally disturbed" (the responsibility of MHRH). However, for such a child, so much of a program as is "special education" in a program approved by the Board of Regents must be provided pursuant to R.I.G.L. §16-24-1 et seq. Anything in the program beyond that which is included in the definition of "special education", supra note 1, is the responsibility of MHRH.

3/ Article IX, paragraph 1.0 provides in relevant part:

IX. Procedural Safeguards

1.0 LEA Responsibility

1.1 Each LEA (local educational agency) shall establish and maintain procedures to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provisions of free appropriate education by such agency. Such procedures shall include but need not be limited to:

1.1.1 Written prior notice to the parent or guardian whenever the LEA proposes to initiate or change or refuses to initiate or change the identification, evaluation or educational placement of the child or the provisions of a free appropriate education.

1.1.4.1 Such appeal shall be submitted in writing within ten school days.

1.1.4.2 A hearing shall be held by the School Committee or its designated hearing officer and a decision shall be given not later than thirty days after the appeal.

1.1.4.3 A copy of the decision shall be mailed to the parents, together with a notice informing them of their right to and procedure for further appeal.

Paragraph 2.0 provides for appeal of the School Committee's decision to the state Board.

4/ Paragraph 1.1.1, Article IX, General Regulations of the State Board of Regents Governing the Special Education

of Handicapped Children (December 19, 1963, amended June 15, 1972), cited in full supra n.3.

5/ The harm likely to be suffered by a child if the Committee makes a wrong decision would be an important factor in deciding whether the continuance of placement provision was constitutionally required. Cf. Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require full procedural safeguards prior to benefit termination where, inter alia, harm from mistken initial determination can be remedied by financial reimbursemnt after post-termination proceedings.) The likelihood that wrongful removal from Bradley Hospital would seriously, and perhaps irremediably, jeopardize Tommy's progress and current well-being weighs especially heavily, for purposes of equitable relief, since that harm might well be irreparable by a later award of monetary damages.

Acting under its powers pursuant to section 5 of the Fourteenth Amendment, Congress has declared that continuance of placement pending completion of state proceedings will be mandatory after October 1, 1977. See 20 U.S.C. §1415(e).

6/ Because the Court holds that the defendants violate due process by failing to follow the applicable state regulations, it does not reach plaintiffs' argument that, even lacking the regulations, due

process would require Tommy's continued placement pending final state resolution of this dispute. Furthermore, since the Court finds the Committee's decision clearly falls within the category of decisions triggering the continued placement provisions of paragraph 4.1 of Article IX of the General Regulations, the Court does not consider plaintiffs' contention that defendants' justification for the funding termination, agreeing that Tommy's placement is proper but alleging a jurisdictional dispute with MHRH, is a transparent attempt to escape their responsibility for funding Tommy pending state proceedings.

FIRST AMENDED COMPLAINT (MAY 10, 1978)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., URSULA J. SMITH, Parents Guardians and Next Friends of Thomas F. Smith, III, and THOMAS F. SMITH, III	:	
VS	:	C.A. No. 76-0510
CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., Associate Rhode Island Commissioner of Education, THOMAS SCHMIDT, Rhode Island Commissioner of Education, THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION, and DR. JOSEPH BEVILACQUA, Director of Rhode Island Department of Mental Health, Retardation and Hospitals	:	

FIRST AMENDED COMPLAINT

PREAMBLE

This action arises under the Constitution and laws of the United States, more specifically, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Education of the

Handicapped Act (20 U.S.C. §§ 1401, et seq.). It is brought to secure to the minor plaintiff his right to a free, appropriate education, suited to his special needs as a handicapped child and his right not to be deprived of said education except by due process of law.

This is an appeal from a final decision of the Rhode Island state educational agency which adversely effects the plaintiffs. This Court has subject-matter jurisdiction under 20 U.S.C. §§ 1415(e)(2) and 1415(e)(4) without regard to the amount in controversy.

The amount in controversy exceeds $10,000.00 exclusive of interest and costs. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331. Declaratory relief is proper pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

1. Plaintiffs, THOMAS V. SMITH, JR., and URSULA J. SMITH are husband and wife, residents of Cumberland, Rhode Island and parents of THOMAS F. SMITH, III. THOMAS F. SMITH, III (hereinafter "Tommy") is a minor child, born February 28, 1968, who is and has been at all times mentioned herein, handicapped physically and mentally because of the effects of cerebral palsy which has affected him since birth. As a result of his handicaps, he has been unable to obtain the advantages and opportunities of education and is in need of "special education" and "related services" as those terms are defined in 20 U.S.C. §§ 1401(16) and 1401(17), respectively, and in 45 C.F.R. §§ 121a.14 and 121a.13, respectively.

2. The defendant, CUMBERLAND SCHOOL COMMITTEE, (hereinafter "the School Committee") is the Rhode Island local educational agency (LEA) which is directly responsible

for providing special education and related services, without cost, appropriate to Tommy's needs as a handicapped child.

3. The defendant, WILLIAM P.ROBINSON, JR. is the Associate Rhode Island Commissioner of Education, (hereinafter "the Associate Commissioner") and the person who has had, at all times mentioned herein, the responsibility to review decisions of the LEA's in Rhode Island, and render decisions on behalf of the Rhode Island Department of Education. The Rhode Island Department of Education (hereinafter "the SEA") is the state educational agency for the State of Rhode Island. The Associate Commissioner is an employee of the SEA, with various and sundry duties, other than acting as a hearing officer for appeals regarding matters of special education from the LEA's in Rhode Island.

4. The defendant, THOMAS SCHMIDT, is the Rhode Island Commissioner of Education

(hereinafter "the Commissioner") and the person designated by Rhode Island law with the responsibility to hear appeals regarding matters of special education from the LEA's in Rhode Island. He has delegated his responsibility and his attendant powers and duties to the Associate Commissioner.

5. The defendant, RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (hereinafter "the Board of Regents") is the organ of Rhode Island government which has the power to adopt policies and procedures with regard to the substantive and procedural rights of handicapped children who reside within the State of Rhode Island. It has general supervisory powers over the educational process within the State of Rhode Island and the duty to enforce the provisions of all laws relating to said educational process.

6. The defendant, DR. JOSEPH BEVILACQUA, is the Director of the Rhode Island Department of Mental Health, Retardation and

Hospitals, (hereinafter "MHRH") and according to the decision of the Associate Commissioner, MHRH is responsible for Tommy's education. The said defendant is joined herein so that he may be fully informed and take such part herein as he may desire, so that complete relief may be afforded between the parties, and a multiplicity of actions avoided.

COUNT I

7. By letter dated November 5, 1976, a copy of which is annexed hereto as Exhibit A, the Cumberland Superintendent of Schools informed Tommy's parents that while he agreed Tommy's placement in a program at Emma Pendleton Bradley Hospital, licensed by the SEA as a special education program for emotionally disturbed children:

> "provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him."

it was his position that:

> "...his (Tommy's) education and care are the responsibility of the Division (Department) of Mental Health, Retardation and Hospitals."

8. Plaintiffs timely appealed the Superintendent's decision, pursuant to the applicable provisions of the Board of Regents - Regulations Education Handicapped Children (hereinafter "State Regulations"), to the School Committee, and on January 20, 1977 a hearing was conducted before the said School Committee on the issue of whether the School Committee or MHRH had the responsibility to provide further funding of Tommy's placement in the program at Bradley Hospital.

9 Immediately after the hearing concluded, the School Committee voted unanimously to uphold its Superintendent of Schools and in effect told Tommy and his parents that it had no responsibility to provide him with a free, appropriate education since it felt he was "emotionally dis-

turbed" and therefore the responsibility of MHRH.

10. On February 10, 1977, the School Committee rendered a written decision. A copy of this decision is annexed hereto as Exhibit B.

11. From that decision, plaintiffs appealed to the Commissioner, and the matter was heard de novo by the Associate Commissioner, on November 2, 1977, November 21, 1977, and December 21, 1977.

12. By motion made October 24, 1977, plaintiffs asked the Associate Commissioner to recuse himself since he was not an impartial hearing officer, as required by federal law. A copy of the Motion to Recuse is annexed hereto as Exhibit C. The Associate Commissioner denied plaintiffs' motion by letter dated October 28, 1977, a copy of which is annexed hereto as Exhibit D.

13. The requirement of the State Regulations that plaintiffs submit the contro-

versy between themselves and the School Committee to the School Committee itself, violates plaintiffs' right to a hearing before an impartial tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and 20 U.S.C. § 1415 (formerly 20 U.S.C. § 1413(a)(13)).

14. The hearing conducted before the Associate Commissioner, likewise denied the plaintiffs procedural due process as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; 20 U.S.C. § 1415; and final regulations adopted by the United States Department of Health, Education and Welfare; specifically, 45 C.F.R. §§ 121a.506, 121a.507, 121a.510 and 121a.512.

15. On April 17, 1978, the Associate Commissioner made a decision on the merits. Plaintiffs received a copy of this decision on April 25, 1978. A copy is annexed hereto

as Exhibit E. Said decision is a nullity since the hearing was conducted before the Associate Commissioner and he is a person disqualified by law from hearing such matters as Tommy's appeal from his LEA. The decision states:

> "...it is the responsibility of MHRH to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH the 'per pupil cost' as its share of the cost of the special educational and related services provided to Thomas."

The Associate Commissioner, in a final footnote to his decision, disposed of plaintiffs' argument that they can not be required to contribute to the cost of providing Tommy with an appropriate special education, as would be the case if MHRH were the agency which placed him in the special education program at Bradley Hospital. He noted:

> "The appellants (plaintiffs) have also asserted that they are not required to pay MHRH any amount for the services provided to Thomas. Their argument in this regard is based on various federal statutes and regulations and, ultimately

on the Supremacy Clause of the United States Constitution. (Art. VI, Para. 2). This issue, however, is not within our jurisdiction on this appeal."

16. At all times mentioned herein, the State of Rhode Island, through the SEA has submitted a State Plan, pursuant to 20 U.S.C. § 1413, to the U.S. Office of Education and in return has received federal funds for state administered programs of special education and related services. Each said State Plan has incorporated the State Regulations and therefore, said Regulations become a binding part of the State Plan and are enforceable as part of the federal statutes and regulations relating to education of handicapped children.

WHEREFORE, plaintiffs seek relief as follows:

1. A declaratory judgment that the procedural safeguards contained in Article IX of the State Regulations do not comply with the Due Process Clause of the Fourteenth

Amendment to the Constitution of the United States; the provisions of 20 U.S.C. § 1415 and 45 C.F.R. §§ 121a.506, 121a.507, 121a.510 and 121a.512.

2. A prohibitory injunction against the Commissioner and Associate Commissioner conducting any more hearings in review of decisions of the Rhode Island LEA's until and unless the defendants, Board of Regents, adopts regulations which conform in all respects to the requirements of 20 U.S.C. 1415 and Chapter 121a of Title 45 - Code Federal Regulations.

3. Reasonable attorneys' fees.

4. Their costs in this action.

5. Such additional and further relief as the Court deems just in the circumstances of this case.

COUNT II

16. The assertion of the School Committee and the Associate Commissioner of Educa-

tion that MHRH is responsible for the cost of Tommy's placement in an appropriate educational program is a transparent attempt, both by the LEA, and the SEA, to avoid responsibility for children such as Tommy for which the LEA can not provide, within the local school system, an appropriate education. In addition, it violates Tommy's rights under federal and state law to have his LEA provide a free, appropriate educational placement without regard to whether or not said placement can be made within the local school system.

17. The decisions of the LEA and the SEA are based soley on fiscal considerations and are not mindful of federal law or Tommy's urgent need for an appropriate educational placement which provides "special education" and "related services".

18. Unless this Court had previously interceded on Tommy's behalf, and ordered the School Committee to continue funding Tommy's

placement, pending exhaustion of state administrative remedies, he would be on the outside looking in while losing the precious benefits he has received at Bradley Hospital.

19. The program at Bradley Hospital has, in fact, provided Tommy with only a "special education" and "related services".

20. Despite being handicapped by, among other things, a serious emotional disturbance, Tommy is entitled to a free, appropriate education at the expense of his LEA.

21. The decision of the Associate Commissioner, in addition to being fatally defective because it vioaltes Tommy's procedural due process rights, is erroneous because it is unsupported by any substantial evidence. It is therefore arbitrary, discriminatory and unfair.

WHEREFORE, plaintiffs seek relief as follows:

1. Review and reversal of the final decision of the SEA (Exhibit E).

2. A declaratory judgment that the School Committee, and not MHRH, is responsible to provide Tommy a free education appropriate to his special needs as a handicapped child.

3. A mandatory injunction against the School Committee, requiring it to provide a free education to Tommy, appropriate to his special needs as a handicapped child.

4. Reasonable attorney's fees.

5. Their costs in this action.

6. Such additional and further relief as the Court deems just in the circumstances of this case.

THOMAS F. SMITH JR.
URSULA J. SMITH,
Parents, Guardians and Next
Friends of Thomas F. Smith, III;
THOMAS F. SMITH, III.
By their attorneys,
OSTER, FAY, GROFF & PRESCOTT
936 Smithfield Avenue
Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

Dated: May 10, 1978

[Certificate of Service omitted in printing]

EXHIBIT A TO THE FIRST AMENDED COMPLAINT: LETTER DATED NOVEMBER 5, 1976 TO PLAINTIFFS LAWYER FROM THE SUPERINDENT OF SCHOOLS STATING THAT THE EUDCATION OF PLAINTIFF THOMAS F. SMITH III WILL NO LONGER BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE

[This exhibit is the same exhibit as Exhibit B to the Complaint. It is set forth in this Joint Appendix supra at 25-26.]

EXHIBIT B TO THE FIRST AMENDED COMPLAINT: DECISION OF THE CUMBERLAND SCHOOL COMMITTEE DATED FEBRUARY 10, 1977 AFFIRMING THAT THE EDUCATION OF PLAINTIFF THOMAS F. SMITH III WILL NO LONGER BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

CUMBERLAND SCHOOL COMMITTEE

****

HEARING IN RE:

THOMAS F. SMITH, JR., URSULA J. SMITH, parents, guardians and next friends of THOMAS F. SMITH, III, and THOMAS F. SMITH, III

vs.

SCHOOL COMMITTEE OF THE TOWN OF CUMBERLAND

****

DECISION

This matter was heard by the Cumberland School Committee on January 20, 1977, on the Appeal of Thomas F. Smith, Jr. and Ursula J. Smith, parents of Thomas F. Smith, III, and

Thomas F. Smith, III from the Decision of Robert G. Condon, Superintendent of Schools, dated November 5, 1976, that "Thomas is an emotionally disturbed child as defined in Section 40.1-7-4 of the General Laws of Rhode Island, 1956, As Amended, and as such, by virtue of Chapter 7 of Title 40.1 of the General Laws, his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals." Due notice was given to the interested parties of the time and place of the hearing. The Appellants and School Committee were represented by Counsel. Testimony was taken, a transcript of which was made, and evidence was presented. Upon the testimony so taken and the evidence presented, we find the following:

1. Thomas F. Smith, III was admitted to Emma Pendleton Bradley Hospital in the Day Hospital Program and is still in that Program. He was admitted on December 9, 1975.

2. The Cumberland School Committee agreed to pay to the Hospital the average per pupil cost for Thomas and the balance of the charges of the Hospital were funded by the Hospital from other sources. This arrangement continued to the end of the school year in June, 1976.

3. In September, 1976, the School Committee of Cumberland again agreed to pay the average per pupil cost to the Hospital for Thomas but the additional funding was unavailable. To the date of the hearing, the Cumberland School Committee had paid almost double the per pupil cost.

4. On November 5, 1976, Superintendent of Schools, Robert G. Condon, informed the parents of Thomas through their attorney that Thomas's education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.

5. In an Action brought by the parents of Thomas in the United States District Court

for the District of Rhode Island, Judge Pettine ordered the School Committee to continue Thomas's placement at Bradley until the appeals process in his case was concluded and that the School Committee be responsible for payment of the Hospital's charges during that period.

6. Thomas has been diagnosed as being emotionally disturbed.

7. Thomas has been disgnosed by an examining physician as being in need of psychiatric care and treatment.

8. At Bradley, Thomas sees a psychiatrist at least weekly.

9. Thomas has had periodic operations on his legs because of cerebral palsy. He has physical limitations and disabilities resulting from cerebral palsy. By definition, page 20 of the Regulations - Education of Handicapped Children of the State Department of Education because of his I.Q. Thomas is not an "Orthopedically Handicapped Child."

10. The Program in which Thomas is enrolled at Bradley is approximately one-third educational; one-third psychiatric and one-third physical.

11. Thomas has made progress at Bradley but "has a long way to go."

12. A referral of Thomas's case to the Department of Mental Health, Retardation and Hospitals was made by Bradley Hospital.

13. No determination has yet been made in Thomas's case by the Screening Committee of Mental Health, Retardation and Hospitals because of the time it took to obtain the necessary information from the various agencies involved. However, such information is now in the possession of the Department of Mental Health, Retardation and Hospitals.

14. Because of funding problems, there is a waiting list of 30 to 35 children for the services provided by the Department of Mental Health, Retardation and Hospitals.

It is our opinion that the education and care of Thomas by virtue of Chapter 7 of Title 40.1 of the General Laws of Rhode Island, 1956, As Amended, are the responsibility of the Department of Mental Health, Retardation and Hospitals. Accordingly, the Appeal is denied.

The Appellants have thirty (30) days to appeal this Decision.

/s/
Edward P. Mousseau

/s/
William J. O'Coin, Jr.

/s/
Louis C. Goodrich

/s/
Walter S. Curtin

/s/
Paul E. Poirier

/s/
Louis J. Kolodzie

February 10, 1977

EXHIBIT C TO THE FIRST AMENDED COMPLAINT: MOTION BY PLAINTIFFS' COUNSEL DATED OCTOBER 24, 1977 TO DISQUALIFY WILLIAM P. ROBINSON JR. AS A STATE ADMINISTRATIVE HEARING OFFICER

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DEPARTMENT OF
EDUCATION

THOMAS F. SMITH, III

-vs-

CUMBERLAND SCHOOL COMMITTEE

MOTION TO RECUSE

Now comes the appellant, Thomas F. Smith, III, and moves that Associate Commissioner of Education, William P. Robinson, Jr., be recused and disqualified from hearing this appeal since he is an employee of the State Educational Agency with such various duties that he is not impartial.

Appellant also moves that the Commissioner of Education appoint some other person to hear this matter who is independent from the State Educational Agency in so far as

his/her duties do not conflict with appellant's right to an impartial hearing officer.

By his attorneys,
OSTER, FAY, GROFF, & PRESCOTT
936 Smithfield Avenue
Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

Dated: October 24, 1977

EXHIBIT D TO THE FIRST AMENDED COMPLAINT: DENIAL DATED OCTOBER 28, 1977 OF PLAINTIFFS' MOTION TO DISQUALIFY

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF EDUCATION
Hayes Street, Providence, Rhode Island 02908

* * *

October 28, 1977

George M. Prescott, Esq.
936 Smithfield Avenue
Lincoln, RI 02865

Re: Thomas F. Smith, III
Vs: Cumberland School Committee

Dear Mr. Prescott:

This is to acknowledge receipt of your letter of October 24 concerning the captioned matter together with the enclosed motions.

With reference to the motion to recuse, I am enclosing a self-explanatory ruling.

In reference to the motion to issue subpoenas, please be advised that the Commissioner of Education does not have authority to issue subpoenas. You are free, of course, to contact the parties and ask them to attend the hearing.

Sincerely,

/s/
William P. Robinson Jr.
Associate Commissioner of
Education

jjj
Enclosure

cc: James Shannahan, Esq.

[Title omitted.]

Appellants motion to recuse, dated October 24, 1977, is denied on the authority of Jennings v. Exeter-West Greenwich Regional School District Committee, 352 A.2d 634 (R.I. 1976) and Witherow v. Larkin 421 U.S. 35 (1975).

/s/ William P. Robinson
Associate Commissioner of
Education

/s/ Arthur R. Pontarelli
Acting Commissioner of
Education

October 28, 1977

EXHIBIT E TO THE FIRST AMENDED COMPLAINT: DECISION DATED APRIL 17, 1978 BY THE STATE COMMISSIONER OF EDUCATION AFFIRMING THAT THE EDUCATION OF PLAINTIFF THOMAS F. SMITH III IS NOT WITHIN THE JURISDICTION OF THE STATE BOARD OF REGENTS FOR EDUCATION AND THAT PLAINTIFFS' EDUCATION ACCORDINGLY NEED NOT BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS — COMMISSIONER OF EDUCATION

MR. & MRS. THOMAS F. SMITH, JR. :

vs. :

CUMBERLAND SCHOOL COMMITTEE :

D E C I S I O N

April 17, 1978

This matter was heard on November 2 and 21 and December 21, 1977 upon the appeal to the Commissioner of Education of Mr. and Mrs. Thomas F. Smith, Jr. from a decision of the Cumberland School Committee denying their request that the School Committee pay the

cost of the attendance of their son, Thomas F. Smith, III, in the Day Hospital Program at the Emma Pendleton Bradley Hospital in East Providence, Rhode Island.

The Commissioner has jurisdiction to hear the appeal by virtue of the provisions of Section 16-39-2 of the General Laws of Rhode Island, 1956, as Amended. The matter was heard by the Associate Commissioner of Education under authorization from the Commissioner.

Due notice was given to the interested parties of the time and place of the hearing. Both parties were represented by counsel. Testimony was taken, a transcript of which was made, and evidence was presented. Upon the testimony so taken and the evidence so presented, we find the following:

1. The appellants and their son, Thomas, are residents of the Town of Cumberland.

2. Thomas is nine years old. He is both "emotionally handicapped" and "physically (orthopedically and neurologically) handicapped."[1]

3. Thomas was enrolled in the Meeting Street School from 1972 until 1975 during which time the Cumberland School Committee paid the tuition for him to attend that school.[2] In September 1975, Thomas was enrolled in a special education class for neurologically impaired children at the Ashton School in the Cumberland School System; he remained there

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[1] The physician who is the Medical Director of the Day Hospital Program and the Director of Community Mental Health at Bradley Hospital and whose specialty is child psychiatry testified that Thomas is a boy of normal intelligence who suffers from a serious emotional disturbance; is both orthopedically and neurologically handicapped; and is in need of psychiatric services. His testimony was not disputed.

[2] The Director of Special Education in the Cumberland School Department testified that he believed the tuition was $1500 per year at that time.

until December 1975, when he was enrolled in the Day Hospital Program at the Emma Pendleton Bradley Hospital in East Providence, where he is currently enrolled.

4. The Day Hospital Program at Emma Pendleton Bradley Hospital is a Special Education Program approved for emotionally handicapped children by the Commissioner of Education in accordance with the Regulations of the Rhode Island Board of Regents for Education.

5. The School Committee paid the per pupil cost[3] for Thomas to attend the Day Hospital Program at Bradley Hospital for the 1975-76 school year.[4]

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[3] The "per pupil cost" is "the average per pupil cost" for the education provided by the School Committee for all children for the school year immediately preceding the year for which it is paid.

[4] The Director of Special Education in the Cumberland

6. The Superintendent of Schools wrote a letter to the attorney for the appellants on November 5, 1976, the text of which reads:

> I am responding to your letter of October 21, 1976.
>
> The Cumberland School Committee does not propose a change in placement for Thomas F. Smith, III. The Committee believes that Emma Pendleton Bradley Hospital provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him.
>
> Thomas is an emotionally disturbed child as defined in Section 40.1-7-4 of the General Laws of Rhode Island, 1956, As Amended, and as such, by virtue of Chapter 7 of Title 40.1 of the General Laws, his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.

School Department testified that the "per pupil cost" which the School Department is paying this year is $1186. He said that the School Committee had agreed to pay up to $2000 toward the cost of Thomas attending the Day Hospital Program at Bradley Hospital for the 1976-77 school year.

> If you desire a hearing before the School Committee, will you please let me know in writing and I will notify you of the date of the hearing.

7. On January 20, 1977, the School Committee held a hearing on the appellants' appeal from the decision of the Superintendent cited supra. The appellants were present and were represented by counsel at the hearing.

8. The School Committee rendered a decision dated February 10, 1977, which stated in pertinent part:

> It is our opinion that the education and care of Thomas by virtue of Chapter 7 of Title 40.1 of the General Laws of Rhode Island, 1956, as Amended, are the responsibility of the Department of Mental Health, Retardation and Hospitals. Accordingly, the Appeal is denied.

9. Subsequently counsel for the appellants appealed the decision of the School Committee to the Commissioner of Education.

10. The Associate Commissioner of Education scheduled a hearing on the appeal for November 2, 1977 and notified the concerned parties of the time and place of the hearing.

11. Counsel for the appellants wrote a letter to the Associate Commissioner on October 24, 1977 with which were enclosed a "Motion to Recuse" and a "Motion to Issue Subpoenas."

12. The Associate Commissioner replied to counsel for the appellants by letter dated October 28, 1977 and informed him that the Commissioner of Education did not have authority to issue subpoenas and enclosed with the letter the ruling of the Commissioner on the "Motion to Recuse", which reads:

> Appellant's motion to recuse, dated October 24, 1977, is denied on the authority of

Jennings v. Exeter-West Greenwich Regional School District Committee, 352 A.2d 634 (R.I. 1976) and Withrow v. Larkin 421 U.S. 35 (1975).

13. At the hearing before the Associate Commissioner on November 2, 1977, counsel for both parties stipulated to the following Findings in the decision of the School Committee rendered on February 10, 1977:

> 1. Thomas F. Smith, III was admitted to Emma Pendleton Bradley Hospital in the Day Hospital Program and is still in that Program. He was admitted on December 9, 1975.
>
> 4. On November 5, 1976, Superintendent of Schools, Robert G. Condon, informed the parents of Thomas through their attorney that Thomas's education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.
>
> 5. In an Action brought by the parents of Thomas in the United States District Court for the District of Rhode Island, Judge Pettine ordered the School Committee to continue Thomas's placement at Bradley until the appeals

process in his case was concluded and that the School Committee be responsible for payment of the Hospital's charges during that period.

11. Thomas has made progress at Bradley but "has a long way to go."

12. A referral of Thomas's case to the Department of Mental Health, Retardation, and Hospitals was made by Bradley Hospital.

13. No determination has yet been made in Thomas's case by the Screening Committee of Mental Health, Retardation and Hospitals because of the time it took to obtain the necessary information from the various agencies involved. However, such information is now in the possession of the Department of Mental Health, Retardation and Hospitals.

14. Because of funding problems, there is a waiting list of 30 to 35 children for the services provided by the Department of Mental Health, Retardation and Hospitals.

A special Assistant Attorney General appeared at the hearing before the Associate Commissioner on November 2, 1977 and moved that he be allowed to submit an amicus curiae

brief on behalf of the Department of Mental Health, Retardation and Hospitals (MHRH). The Associate Commissioner granted that motion, to which there had been no objection.

There is no disagreement between the parties concerning the placement of Thomas in the Day Hospital Program at Bradley Hospital. They are agreed that that is appropriate for him. They disagree, however, as to who is responsible for providing (i.e. paying the cost of) special education and related services for Thomas at Bradley Hospital.

The appellants contend that it is the responsibility of the School Committee; the School Committee contends it is the responsibility of MHRH; and MHRH contends it is the responsibility of the School Committee.

Section 16-24-1 of the Rhode Island General Laws reads:

> Duty of school committee to provide special education. - In any city or town where there is a child within the age range as designated by the regulations of the state

board of education, who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented, the school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of education in accordance with its regulations.

Section 16-24-2 of the Rhode Island General Laws reads:

> Regulations of state board. - It shall be the duty of the state board of education to set up regulations for the purpose of carrying out the intent of this chapter; such regulations shall include:
>
> 1. criteria to determine who is to be included in the category of the exceptional child and all persons from the age of three (3) to twenty-one (21) who are mentally retarded and/or multihandicapped must be included in establishing the category of exceptional child;
>
> 2. minimum criteria for establishment and/or reimbursement of special facilities (such as public school classes, hospital schools, etc.) for each category of exceptionality;
>
> 3. methods of reimbursement;

4. teacher-training recommendations, minimum teacher qualifications;

5. transportation; and

6. any other regulations the state board deems necessary to implement this chapter.

Pursuant to the provisions of § 16-24-2, the State Board of Education adopted Regulations: Education of Handicapped Children on December 19, 1963.[5] The sections of the General Regulations which we consider relevant to this matter are the following:

I. Definitions

A. Exceptional Handicapped Children - is defined to include children who are emotionally handicapped,[6]

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[5] The Regulations of the State Board of Education became the Regulations of the Board of Regents for Education on July 1, 1970 upon the assumption by that Board on that date of all its powers and duties pursuant to the provisions of Chapter 231 of the Public Laws of 1969 and subsequently by the successor Board of Regents for Education as established by Chapter 249 of the Public Laws of 1973.

[6] The Emotionally Handicapped is defined in Section 1A of the Regulations Governing the Education of the Emotionally Handicapped as "a child whose diagnosed social and/or emotional problem is so severe that

mentally retarded (educable, trainable, severe and profound); physically handicapped (health impaired, hearing, homebound, neurologically, orthopedically, speech, aphasic, and visually); and multihandicapped. A child so defined shall be eligible for special education upon the attainment of this third birthday until such time as he has completed high school or reaches the age of twenty-one whichever comes first.

B. Special Education - is defined as educational facilities, materials, evaluative services, therapeutic services, and instruction which are especially designed and operated by personnel with special educational qualifications, to meet the particular needs of exceptional handicapped children.

II. Establishment of Special Education Programs

A. The school committee of each community shall establish within its school system the special education program required by these regulations and/or it shall provide for the free education of all

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adjustment to a regular class appropriate for his age is precluded."

resident exceptional handicapped children either through these programs or in other special programs approved by the Commissioner of Education. (Whenever a responsibilty is placed on a community by these regulations it shall be the responsibility of the school committee).

The Board of Regents for Education amended the Regulations on April 20, 1977, and the following sections of the General Regulations which we consider to be relevant to this matter became effective October 1, 1977:

II. Definitions

1.0 Handicapped Children - Includes all children who are behaviorally disordered,[7] mentally retarded, physically handicapped, (health impaired, hearing, homebound, neurologically, orthopedically, speech, aphasic, and visually), multi-handicapped and learning disabled as herein-

[7] It should be noted that, although the cateogry of "emotionally handicapped" children is not listed in the definition of Handicapped Children cited supra, the category of "behaviorally disordered" children does include those children who are emotionally handicapped and emotionally disturbed.

after defined. Any child so defined shall be eligible for special education upon the attainment of his/her third birthday and until such time as he/she has completed high school or reaches the age of twenty-one (21), whichever comes first.

1.1 The Behaviorally Disordered: A child who exhibits a significant and observable disorder to a marked degree over an extended period of time (as determined by the evaluation process) in one or more of the following:

1.1.1 Extreme difficulty in learning which cannot be explained by intellectual, sensory, neurophysiological, or general health factors; nor can it be attributed to ethnic or cultural differences;

1.1.2 Consistent inability in establishing or maintaining satisfactory interpersonal relationships with peers and/or teachers.

1.1.3 Constant and pronounced inappro-

priate or immature types of behavior or feelings under normal conditions;

1.1.4 General pervasive mood of unhappiness or depression to a marked degree and over a significant length of time;

1.1.5 Psychosomatic complaints related to personal, social, or school problems;

1.1.6 The above definition should include but not be limited to disorders which are referred to as: autism, schizophrenia, neurosis, psychosis, emotional handicap and emotional disturbance. (Emphasis added.)

2.0 Special Education - is defined as appropriate educational services, facilities, materials, individualized instruction, evaluative services, therapeutic and other related services provided at no cost to the parents or guardians and which are especially designed and operated by personnel with special

educational qualifications to meet the particular needs of handicapped children.

7.0 Therapeutic and Related Services - is defined to include transportation and such developmental, corrective and other supportive services (including but not limited to special individualized assistance in math and remedial reading, guidance and counseling, physical education, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, mobility training, and medical services except that such medical services shall be for diagnosis and evaluation only) as may be required to assist a handicapped child to benefit from special education and includes the early identification and assessment of handicapping conditions in children.

III. Establishment of Special Education Programs

1.0 Responsibility - The school committee of each school district shall establish within its

school district the special education required by these regulations and/or it shall provide for the free education of all resident handicapped children either through these programs or in other special education programs approved by the Commissioner of Education. (Whenever a responsibility is placed on a school district by these regulations it shall be the responsibility of the school committee to carry out these regulations.)

The sections of § 40.1-7 of the Rhode Island General Laws which we consider to be relevant to this matter are the following:

40.1-7-2. State program created. - There is hereby established within the department of mental health, retardation and hospitals a program to be known as "Services for emotionally disturbed children."

40.1-7-3 Responsibility of department. - The department is charged with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children and to cooperate to his end with all reputable agencies of a public

or private character serving such children and to take the initiative in all matters involving the interests of such children where adequate legal provision therefor has not already been made.

40.1-7-4 Definition. - Whenever used in this chapter, or in any order, rule or regulation made or promulgated pursuant to this chapter, or in the printed forms prepared by the department or the director, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, the term:

1. "Care and treatment" means medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for education.

. . .

5. "Emotionally disturbed child" means any person under the age of twenty-one (21) years, and who has been diagnosed and judged by the examining physician to be in need of psychiatric care and treatment.

40.1-7-7. Contributions from communities [Effective until July 1, 1979]. - Each community, as defined in Chapter [7 of title 16] of the general laws, shall contribute to the department, in accordance with regulations to be promulgated by the director, its average per pupil cost for education for the reference year, as "reference year" is defined in said chapter [7 of title 16] as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the jurisdiction of the board of regents for education. (Emphasis added.)[8]

40.1-7-8 Contribution from parents. - The parents of children in the program, depending upon their resources, shall be obligated

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[8] Section 4 of Chapter 130 of P.L. 1976 amended this section (effective July 1, 1979) to read:

Each community, as defined in chapter 7 of title 16 of the general laws, shall contribute to the department, in accordance with regulations to be promulgated by the director, its aveage per pupil cost for special education for the second school year preceding as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the control and management of the school committee. (Emphasis added.)

> to participate in the costs of the care and treatment of their children in accordance with regulations to be promulgated by the director.

The appellants contend that the School Committee's position is untenable in that, pursuant to §40.1-7 of the Rhode Island General Laws, MHRH's responsibility is to provide care and treatment for emotionally disturbed children and that "care and treatment" are defined to include "medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular class or special education programs under the jurisdiction of the board of regents for education." (Emphasis added.) The appellants contend that because the Day Hospital Program at Bradley Hospital has been approved by the Commissioner of Education as a special

education program for emotionally handicapped children, that program is under the jurisdiction of the Board of Regents for Education. They contend, therefore, that it is not the responsibility of MHRH to pay for Thomas's education at Bradley Hospital, but rather it is the responsibility of the School Committee.

We do not concur with the appellants' contention that, merely because it has been approved by the Commissioner of Education, the program at Bradley Hospial is under the "jurisdiction" of the Board of Regents. We believe that the approval of the program by the Commissioner of Education permits Bradley Hospital lawfully to operate the program in accordance with the Regulations of the Board of Regents and to be eligible to receive such public and/or private funds for which the approval of the program by the Commissioner of Education is required. It is our opinion, however, that this approval of the program by

the Commissioner of Education does not remove the program from the jurisdiction of the governing body of Bradley Hospital. Therefore, we find that the special education program at Bradley Hospital is not under the jurisdiction of the Board of Regents for Education.

We believe that the reference in §40.1-7 to "those regular class or special education programs under the jurisdiction of the board of regents for education" means in effect those programs under the control and management of the school committee. We believe that the General Assembly's substitution of the words "under the control and management of the school committee" in §40.1-7-7 (as amended effective July 1, 1979) for the words "under the jurisdiction of the board of regents for education" give additional support to our interpretation of the words in question.[9] Thus, it is our opinion that, pursuant to the provisions of §40.1-7, it is

the responsibility of MHRH to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH the "per pupil cost" as its share of the cost of the educational and related services provided to Thomas.[10]

The School Committee paid the per pupil cost for Thomas to attend Bradley Hospital

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[9] See footnote 8.

We realize that subsequent legislation is a tool of very limited utility in interpreting earlier enactments. Nevertheless, the wording of the amendment which will become effective on July 1, 1979 can be viewed as an indication that the General Assembly understands the present statute as we do and sought to clarify its somewhat opaque language.

In any event we would stress that we first construed the critical words in §40.1-7 without reliance on the amendment. Our interpretation is not based upon the amendment but upon our own analysis of the present statute; we have cited the amendment in an a posteriori manner simply to show that it is consistent with our analysis.

[10] We have carefully considered the brief of the amicus, which places great reliance on the language of §16-24-1 of the General Laws (quoted at page 6 supra). It is our opinion, however, that the subsequent specific provisions of §40.1-7 must control to the extent that they are at all inconsistent with the general language of §16-24-1.

for the 1975-76 school year and agreed to pay up to an amount substantially in excess of the per pupil cost for the 1976-77 school year.[11] We conclude that the School Committee has thereby agreed to pay the per pupil cost for the 1977-78 school year. Therefore, we find that the School Committee has paid and has agreed to pay that amount which it is required by law to pay toward the cost of Thomas's education and related services in the Day Hospital Program at Bradley Hospital.[12]

Accordingly, the appeal is denied.

/s/ William P. Robinson
Associate Commissioner of
Education

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[11] See Finding #5 and footnote 4.

[12] The appellants have also asserted that they are not required to pay MHRH any amount for the services provided to Thomas. Their argument in this regard is based on various federal statutes and regulations and, ultimately, on the Supremacy Clause of the United States Constitution (Art. VI, Para. 2). This issue, however, is not within our jurisdiction on this appeal.

Approved: /s/ Thomas C. Schmidt
Commissioner of Education

April 17, 1978

ANSWER OF STATE DEFENDANTS WILLIAM ROBINSON, THOMAS SCHMIDT, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (MAY 31, 1978)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing]

ANSWER OF WILLIAM ROBINSON, ASSOCIATE RHODE ISLAND COMMISSIONER OF EDUCATION, THOMAS SCHMIDT, RHODE ISLAND COMMISSIONER OF EDUCATION, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION.

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted

SECOND DEFENSE

Defendants possess immunity and good faith immunity to this action.

THIRD DEFENSE

Defendants admit paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the complaint. Defendants deny paragraphs 17 and 21 of the com-

plaint. Defendants aver that they are without sufficient information to form a belief as to the validity of the allegations contained in pararagraphs 18 and 19 of the complaint. Paragraphs 2, 13, 14, 16 and 20 contain conclusions of law to which no answer is required, but to the extent that these paragraphs contain any allegations of fact, they are denied.

FOURTH DEFENSE

In regard to paragraph 1 of the complaint, defendants admit that plaintiffs are residents of Cumberland, Rhode Island and that Thomas F. Smith, III was born on February 28, 1968. Defendants admit that Thomas Smith is handicapped physically and mentally and that Thomas Smith suffers from cerebral palsy, but defendants aver that they are without sufficient information to form a conclusion as to the etiology of Thomas Smith, III's mental disability. Defendants deny that Thomas has been unable to obtain

the "advantages and opportunities of education". Defendants admit that Thomas is in need of "special education and related services".

FIFTH DEFENSE

In regard to paragraph 2 of the complaint, defendants admit the same but answer further that in accordance with defendant Robinson's opinion, MHRH has responsibility in this case.

SIXTH DEFENSE

In regard to paragraph 12 of the complaint, defendants deny that the associate Commissioner was not an impartial hearing officer or that any federal law required him to recuse himself. Defendants admit the other allegations contained in paragraph 12 of the complaint.

SEVENTH DEFENSE

In regard to paragraph 15 of the complaint, defendants admit that on April 17, 1978, the Associate Commissioner made a

decision on the merits and that plaintiff received the same on April 25, 1978. Defendants admit that the portions of the decision found in paragraph 15 are quoted correctly. Defendants deny any other allegations or conclusions of law to be found in prargraph 15 of the complaint.

EIGHTH DEFENSE

In regard to paragraph 16 of the complaint defendants admit that a state plan has been submitted and that federal funds have been received. Defendants deny any other allegation or conclusion of law to be found in paragraph 16 of the complaint.

By their Attorney:

JULIUS C. MICHAELSON
ATTORNEY GENERAL

By: /s/
FORREST L. AVILA
Special Assistant
Attorney General
56 Pine Street
Providence, Rhode Island
02903

May 31, 1978.

[Certificate of Service omitted in printing]

OPINION: CERTIFICATION OF TWO QUESTIONS TO THE SUPREME COURT OF RHODE ISLAND (DEC. 22, 1978)

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., URSULA J. SMITH, et al.	)	
v.	)	C.A. No. 76-0510
CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., et al	)	

OPINION

PETTINE, Chief Judge. Plaintiffs, a ten year old multihandicapped boy and his parents, contend that Rhode Island state and federal law require that the Cumberland School Committee provide plaintiff Thomas F. Smith, III, with free education adequate to address his special physical and emotional needs.

There is no disagreement as to the essential facts in this case. Thomas suffers from physical handicaps and is emotionally

handicapped and/or disturbed. The Cumberland School Committee's own educational programs failed to satisfy Thomas' particular needs. The School Committee initially provided partial funding for the transfer of Thomas to the Day Hospital Program at Bradley Hospital; all agree that this program is appropriate for Thomas. The parties disagree, however, as to who is responsible for financing the special education and related services for Thomas at Bradley Hospital.

On an appeal from an administrative decision, the Rhode Island Commissioner of Education decided that the state's Department of Mental Health, Retardation and Hospitals (MHRH) was responsible for funding and providing the necessary services for Thomas. This has long been the position of the defendant Cumberland School Committee. However, the state defendants (representing MHRH) and the plaintiffs argue that the local school board must fund such an educational program.

The plaintiffs are particularly concerned due to the significant limitations and restrictions that must be complied with before the MHRH is required to provide funding. Local school boards do not operate under similar restrictions. The plaintiffs attack the Commissioner's legal conclusions as erroneous interpretations of the various Rhode Island statutes and regulations dealing with the education and treatment of handicapped children. Plaintiffs argue that such statutory construction violates federal law and premise this action on 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343.

The State defendants have requested that this Court abstain from deciding the state-law issues in this case and certify a question concerning the disputed construction of the state law to the Rhode Island Supreme Court. After reviewing the Rhode Island statutory and regulatory framework in question, this Court agrees that certification is proper and appropriate.

R.I.G.L. §16-24-1 places a duty upon the local school committee to provide special education for any child who is "either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented." The school committee of the town shall "provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of education in accordance with its regulations."

This "special education" includes "educational facilities, materials, evaluative services, therapeutic services, and instruction which are especially designed and operated by personnel with special educational qualifications, to meet the particular needs of exceptional handicapped children."

The most recent regulations, promulgated pursuant to §§16-24-1 and 16-24-2, effective October 1, 1977, erect guidelines under which

the local school board must operate. These regulations define handicapped children for the purposes of §16-24-1. This definition includes all children who are "behaviorally disordered" and that term is intended to include both "emotional handicap and emotional disturbance." For these emotionally handicapped and disturbed children, the local school boards have the responsibility to establish and provide "for free education of all resident handicapped children." If the local school board decides not to establish their own special education program, it shall provide the free education "in other special education programs approved by the Commissioner of Education."

There is no dispute that plaintiff child is either emotionally disturbed or emotionally handicapped and, thus, "handicapped" for the purposes of §16-24-1. The Cumberland School Committee also does not dispute that their own educational programs could not meet

plaintiff's needs. The Day Hospital Program at Bradley Hospital has furnished adequate services to fulfill educational needs and has been approved by the Commissioner of Education pursuant to the regulations. Therefore, if one focuses solely upon §16-24-1 and its accompanying regulations, the plaintiffs' argument that the local school committee is responsible for providing Thomas a free and appropriate education appears convincing.

The plaintiffs' argument is strengthened by the fact that Rhode Island has been receiving federal funds under The Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. and must comply with the mandates of that Act. Under the Act, Rhode Island must develop a plan whereby "a free appropriate public education will be available for all handicapped children within the State not later than September, 1978...." 20 U.S.C. §1412(2)(B). There seems little doubt that the child qualifies as "handicapped" under 20

U.S.C. §1401(1). Because the state statute, §16-24-1, provides for free special education for such handicapped children, it appears to dovetail with the requirements of the federal act. In an effort to insure that federal and state law comport with each other, this Court is tempted to apply §16-24-1 to the present action. Despite these appealing arguments for the application of §16-24-1, another state statute seriously clouds the issue.

Rhode Island law also requires that the state take responsibility, through the MHRH department, for the "development of specialized services for the care and treatment of emotionally disturbed children." R.I.G.L. §40.1-7. Care and treatment is defined as:

> medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for education.

R.I.G.L. §40.1-7-4 (emphasis added).

This state statute places only a limited responsibility upon the state and the MHRH. Under R.I.G.L. §40.1-7, alternative sources of funding, including the income of parents and insurance proceeds, must be found inadequate before MHRH is required to expend funds. Further MHRH is under no duty to pay for the treatment of eligible children if such payment will exceed the amount appropriated to the Department. In short, the treatment provided by MHRH is not necessarily free; nor is it available if the payment would require the Department to incur a deficit. See Roe v. Affleck, No. 77-76 Appeal (R.I. 8/16/78) (deciding question certified by this Court); In re John Doe, A Juvenile, No. 78-110 M.P. (R.I. 8/31/78). Due to these limitations, plaintiffs argue that §40.1-7 must not be applied because if fails to comport with the standards of the federal Education for All Handicapped Children Act.

On the appeal from the administrative hearing, the Commissioner of Education examined both §16-24-1 and §40.1-7 and found the latter section controlling. He concluded that MHRH was responsible for Thomas' education at Bradley Hospital. To reach this decision the Commissioner apparently viewed §40.1-7 as overlapping and overriding some portions of §16-24-1 and construed the exception clause in §40.1-7-7 narrowly. According to the Commissioner, not all the "other special education programs approved by the Commissioner of Education" pursuant to §16-24-1 qualify under the §40.1-7-7 exemption as "special education programs under the jurisdiction of the board of regents for education." The Commissioner reasoned that merely because the program at Bradley Hospital has been approved by the Commissioner of Education, it is not automatically under "the jurisdiction" of the Board of Regents. The Commissioner concluded "that

the reference in §40.1-7 to 'those regular or special education programs under the jurisdiction of the board of regents for education' means in effect those programs under the control and management of the school committee." Therefore, the MHRH was deemed to have responsibility for those other, independent education programs that were approved by the Commissioner under §16-24-1 but were not under the control or management of the school committee. In other words, the Commissioner construed the state statutes not as addressing two discrete situations, but as overlapping; and in the areas of overlap, the MHRH was to assume responsibiltiy.

Therefore, the critical issue in this case is the relation between the exclusionary phrase of §40.1-7-7 -- "special education programs under the jurisdiction of the board of regents for education" -- and the §16-24-1 regulations that require the local school board to provide, free of charge, its own

educational programs or "other special educational programs approved by the Commissioner of Education." The critical issue revolves around the answers to two questions:

> 1. If the educational programs organized and/or managed by a local school committee fail to provide adequate special education for a resident handicap, do the applicable regulations promulgated pursuant to R.I.G.L. §§16-24-1, 16-24-2 require the school committee to provide free education in another "special education program approved by the Commissioner of Education"?
>
> 2. If so, are those "other special education programs" that are approved by the Commissioner of Education pursuant to §16-24-1 "special educational programs under the jurisdiction of the board of regents for education" as defined in R.I.G.L. §40.1-7-7?

These questions cannot be easily answered from the text of the various statutes and regulations. The term "under the jurisdiction of the board of regents for education" can be construed broadly as including all the programs suggested in the regulations passed pursuant to §16-24-1 and

§16-24-2. Or, it may be construed narrowly, as it was by the Commissioner of Education, to mean only those special educational programs under the actual control and management of the school committee.

Depending upon the interpretation of this legislative and regulatory maze, federal constitutional questions may arise. If the statutes cannot be interpreted to conform with federal regulatory requirements, the Supremacy Clause of the Constitution dictates finding such non-conforming law violative of the federal statutory scheme. However, before reaching this federal claim, this Court should allow the state court to construe these state statutes which are open to several interpretations, some of which avoid a conflict with federal law. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 196 (1940). As the United States Supreme Court has noted:

> Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong.
>
> Harris County Comm'rs Court v. Moore, 420 U.S. 77, 84 (1975).

See also Lake Carriers Association v. MacMullen, 406 U.S. 498 (1972).

This Court is aware of the delay that the certification process entails. The state law question facing this Court, however, is a serious and open one. The Rhode Island Supreme Court has not reached the question of the respective "jurisdictions" or responsibilities of the MHRH and the local school boards; however, it has stressed the complexity of the issue:

> The right of the plaintiff in this case to be placed in a facility at the expense of MHRH is simply not clear.... It is unclear with whom the ultimate responsibility of providing for Diane rests: MHRH or the City of Cranston.

> These are questions of great import to this case and should be properly raised.... Although we sympathize with the Giacominis' plight, the complexity of the issues raised by their case simply precludes the type of relief granted by the trial justice.
>
> Giacomini v. Bevilacqua, 374 A.2d 66 (1977).

Not only is the question complex and unanswered, but its resolution will have far reaching effects throughout the state. In such situations, certification of the question to the State Supreme Court is likely to avoid the possibility of unnecessary friction in state-federal relations. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 196, 199 (1940). Further, plaintiffs already enjoy preliminary injunctive relief; therefore, "the delays inherent in the abstention process" will not endanger any of plaintiffs' "valuable federal rights." Harris County Comm'rs Court v. Moore, supra at 83.

This Court is not persuaded by the arguments of amicus curiae against abstention. Amicus curiae correctly notes that state decisions have clearly and rigorously limited the financial responsibilities of the MHRH. See, e.g., Roe v. Affleck, supra. Yet, these decisions do not address the issue of whether an emotionally disturbed child seeking special eduction is the responsibility of the MHRH or the local school board; nor do the decisions detail the contours of the local school board's responsibilities or "jurisdiction."

The two questions specified in this opinion must be certified to the Rhode Island Supreme Court in the interests of comity and in order to avoid unnecessary adjudication of constitutional and federal claims. The two questions are hereby certified and the State defendants' motion is granted. An order and certification will be prepared by the defendants as required by Rhode Island Supreme Court Rule 6, as amended.

/s/ Raymond J. Pettine
Chief Judge

December 22, 1978

ORDER OF CERTIFICATION SUBMITTING CERTAIN QUESTIONS OF STATE LAW TO THE HONORABLE SUPREME COURT OF THE STATE OF RHODE ISLAND FOR DETERMINATION (JAN. 16,1979)

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., URSULA J. SMITH, et al	)	
	)	C.A. No.
vs.	)	76-0510
CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., et al	)	

ORDER OF CERTIFICATION SUBMITTING CERTAIN QUESTIONS OF STATE LAW TO THE HONORABLE SUPREME COURT OF THE STATE OF RHODE ISLAND FOR DETER-
DETERMINATION

There having arisen in the above-entitled matter serious and open questions of state law which may be determinative of the case and the resolution of which will have far reaching effects throughout the State of Rhode Island, the Federal District Court for the District of Rhode Island, in the interests of comity and in order to avoid unnecessary adjudication of constitutional and

federal claims hereby certifies, to the Rhode Island Supreme Court, pursuant to Supreme Court Rule 6, the following questions of state law:

1) If the educational programs organized and/or managed by a local school committee fail to provide adequate special education for a resident handicapped child, do the applicable regulations promulgated pursuant to R.I.G.L. S. 16-24-1, 16-24-2 require the school committee to provide free education in another "special education program approved by the Commissioner of Education"?

2) If so, are those "other special education programs" that are approved by the Commissioner of Education pursuant to S. 16-24-1 "special education programs under the jurisdiction of the board of regents for education" as defined in R.I.G.L. S. 40.1-7-7?

A statement of all the facts relevant to the above certified questions which shows fully the nature of the controversy in which the question arose is contained in the annexed opinion of this Court.

So Ordered.

* * *

Enter:

/s/ Raymond J. Pettine
Chief Judge

Jan. 16, 1979

ORDER: MODIFICATION OF THE PRELIMINARY INJUNCTION SO AS TO REQUIRE DEFENDANTS TO MAINTAIN PLAINTIFF THOMAS F. SMITH III IN THE SPECIAL EDUCATION PROGRAM AT HARMONY HILL SCHOOL (JULY 10, 1979)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR. URSULA J. SMITH, Parents Guardians and Next Friends of Thomas F. Smith, III and THOMAS F. SMITH, III	:	
VS	:	C.A. NO. 76-0510
CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., Associate Rhode Island Commissioner of Education, THOMAS SCHMIDT, Rhode Island Commissioner of Education, THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION, and DR. JOSEPH BEVLACQUA, Director of Rhode Island Department of Mental Health, Retardation and Hospitals	:	

O R D E R

This matter having come before the Court on plaintiffs' Motion To Modify Preliminary Injunction, and the parties having agreed in chambers that said motion be granted,

IT IS HEREBY ORDERED;

1. Said motion be and hereby is granted, and the defendant, Cumberland School Committee, is hereby preliminarily enjoined, until further order of this Court, to maintain the minor plaintiff, Thomas F. Smith, III, in the day program of special education at Harmony Hill School.

2. This order is without prejudice to any of the said defendant's rights with regard to the merits of the underlying controversy of its responsibility to fund such a placement viz a viz the responsibility of the Rhode Island Department of Mental Health, Retardation and Hospitals.

ENTER: /s/ Raymond J. Pettine
Chief Judge
July 9/79

* * *

OPINION OF THE SUPREME COURT OF RHODE ISLAND: CERTIFIED QUESTIONS ANSWERED AFFIRMATIVELY IN FAVOR OF PLAINTIFFS (JUNE 3, 1980)

SUPREME COURT OF RHODE ISLAND

Thomas F. Smith, Jr., et al.

v.

Cumberland School Committee, et al.

No. 79-22-Appeal.

June 3, 1980.

OPINION

DORIS, Justice

The United States District Court for the District of Rhode Island has certified to this court two questions of law that require us to decide whether a school committee or the Department of Mental Health, Retardation and Hospitals (MHRH) must bear the cost of providing special education for handicapped children.

The facts underlying this litigation are not in dispute. Thomas Smith, a twelve-year-old multihandicapped child, and his parents reside in Cumberland, Rhode Island. Due to Thomas's physical and emotional handicaps, the regular programs offered in the Cumberland school system do not meet his particular educational needs. Since December 1975, therefore, Thomas has been enrolled in the Day Hospital Program at Bradley Hospital, which, the parties agree, provides him with an appropriate education. The Cumberland School Committee (school committee) partially funded the tuition for this program for approximately one year following Thomas's enrollment.[1] In November 1976, however, the superintendent of schools informed plaintiffs that MHRH, not the school committee, was responsible for providing Thomas's special education. The school committee unanimously

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1. The annual tuition for this program is $18,000.

upheld the superintendent, concluding that G.L. 1956 (1977 Reenactment) §§ 40.1-7-1 to -9 dictated that the education and care of Thomas were the responsibility of MHRH. The plaintiffs appealed the decision of the school committee to the associate commissioner of education, who held that MHRH must provide the special education and related services and that the school committee must contribute to MHRH only the "per pupil cost" as its share of the services provided to Thomas.

The plaintiffs petitioned the Family Court for an order that the school committee continue to finance Thomas's special education. The Family Court dismissed the action for want of jurisdiction. The plaintiffs then commenced a civil action in Superior Court seeking the same relief. The court dismissed this action on the ground that plaintiffs had not exhausted their administrative remedies. The plaintiffs then filed

a third action in the United States District Court for the District of Rhode Island seeking a mandatory injunction ordering the school committee to continue funding Thomas's special education. The District Court found that G.L. 1956 (1969 Reenactment) § 16-24-1, which requires local school committees to provide a special education for handicapped children, and G.L. 1956 (1977 Reenactment) §§ 40.1-7-1 to -9, which establish within MHRH a program for emotionally disturbed children, both dealt with educating handicapped children. Because of the apparent statutory conflict, the District Court chose to abstain from deciding the case in order that this court might be allowed an opportu;nity to construe the statutes.[2] Accordingly, the District Court certified to this court pursuant to Sup.Ct. Rule 6 the following two

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2. Prior to this decision, the United States District Court had ordered the school committee to continue funding Thomas's education at Bradley Hospital until his appeal was concluded.

questions:

> "1. If the educational programs organized and/or managed by a local school committee fail to provide adequate special education for a resident handicapped child, do the applicable regulations promulgated pursuant to R.I.G.L. S. 16-24-1, 16-24-2 require the school committee to provide free education in another 'special education program approved by the Commissioner of Education'?
>
> "2. If so, are those 'other special education programs' that are approved by the Commissioner of Education pursuant to S. 16-24-1 'special education programs under the jurisdiction of the board of regents for education' as defined in R.I.G.L. S. 40.1-7-7?"

We note at the outset that the statutes serve different purposes: § 16-24-1 is by its terms educational in nature, while §§ 40.1-7-1 to -9 have a primarily therapeutic purpose, though they include a provision for educational services. Pursuant to § 16-24-1, a school committee has an affirmative obligation to provide the type of special education that will best satisfy the needs of a resident handicapped child whose mental retardation or physical or emotional handicap

prevent his normal educational growth and development.[3] Though the predecessor to this statute was enacted in 1952, § 16-24-1 must be viewed in the context of the Education for All Handicapped Children Act of 1975 (the Act), 20 U.S.C.A. §§ 1401-1461 (West 1978). The Act is a funding vehicle through which the federal government channels money to the states to provide full educational opportunities to handicapped children. Loughran v. Flanders, 470 F.Supp. 110, 113 (D.Conn. 1979). To be eligible for these federal funds, a state must comply with a number of

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3. General Laws 1956 (1969 Reenactment) § 16-24-1 provides:

> "Duty of school committee to provide special education. -- In any city or town where there is a child within the age range as designated by the regulations of the state board of education, who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented, the school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of education in accordance with its regulations."

conditions, such as establishing a policy that assures all handicapped children of a right to a free appropriate public education, developing a plan to implement the policy of providing a full educational opportunity to all handicapped children, and establishing certain procedural safeguards to protect the rights of handicapped children.[4] Additionally, the local educational agency[5] in each

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4. 20 U.S.C.A. § 1412(1), (2), (5) (West 1978). A "'free appropriate public education'" is defined as:
"special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involed, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C.A. § 1401(18) (West 1978).

5. A "'local educational agency'" is:
"a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such

state must establish and annually revise an individualized education program[6] for each handicapped child.

The Board of Regents for Education must comply with the federal requirements because the state receives federal funds under the

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term also includes any other public institution or agency having administrative control and direction of a public elementay or secondary school." 20 U.S.C.A. § 1401(8) (West 1978).

6. An "'individualized education program'" is defined as:

"a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." 20 U.S.C.A. § 1401(19) (West 1978).

Act. It is evident from the regulations adopted by the board of regents pursuant to § 16-24-2 that the regents have attempted to conform to the Act by making our existing educational system for handicapped children provide special educational services in the manner envisioned by the Act. Under the Act, it is the responsibility of the local educational agency to administer the special education programs. Consistent with this requirement, the regulations adopted by the board of regents require the school committees to provide a free special education for handicapped children either through their own programs or through other private special education programs approved by the Commissioner of Education.[7] In the event that the

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7. Regulations of the board of regents governing the Special Education of Handicapped Children § 1, Art. III(1). The regulation provides:

> "Responsibility--The school committee of each school district shall establish within its school district the special educaiton required by these regulations and/or it shall provide for the free education of all resident handicapped

established local educational programs fail to provide an adequate special education for a handicapped child, the regulations of the board of regents would thus require the school committee to "provide for the free education * * * through * * * other special education programs approved by the Commissioner of Education."

The statutory program created within MHRH by G.L. 1956 (1977 Reenactment) §§ 40.1-7-1 to -9 to provide services for emotionally disturbed children relieves the school committee of its obligation to educate handicapped children only in certain limited circumstances. As we stated earlier, this program has a primarily therapeutic purpose of providing "psychiatric care and treatment" to emotionally disturbed children. The educational services to which a child might be

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children either through these programs or in other special education programs approved by the Commissioner of Education."

entitled as part of his "care and treatment" are thus incidental to the medical and psychiatric services he receives. We believe that the Legislature incorporated a provision for educational services into the definition of "care and treatment" to ensure that an emotionally disturbed child would continue to receive educational services while being treated in the MHRH program. We have previously held that MHRH has only a contingent obligation to provide educational services to handicapped children. The child must first be "emotionally disturbed," which requires that he "be in need of psychiatric care and treatment." G.L. 1956 (1977 Reenactment) § 40.1-7-4(5). If the child is not in need of such treatment, he is not "emotionally disturbed" and is not eligible for the MHRH program. See Naughton v. Goodman, 117 R.I. 113, 117-18, 363 A.2d 1345, 1348 (1976). Secondly, even if a child is eligible for the program, he is not thereby guaranteed treat-

ment. The availability of all benefits under the program is limited by the funding the program has received. When the appropriated funds are exhausted, MHRH need not provide any "care and treatment" or educational services, regardless of a child's eligibility or need for them. Roe v. Afflect, R.I., 390 A.2d 361, 368 (1978). In such a situation the director of MHRH fulfills his responsibility to the eligible handicapped children by placing their names on a waiting list until such time as there are sufficient funds to pay for their care and treatment. See In re Doe, R.I., 390 A.2d 390, 395-96 (1978).

Once an emotionally disturbed child is admitted to the MHRH program, the educational services available as part of the "care and treatment" are further limited by statute in that "care and treatment" includes only "those educational services furnished to a child other than those regular or special education programs under the jurisdiction of

the board of regents for education." G.L. 1956 (1977 Reenactment) § 40.1-7-4(1) (Emphasis added). The emphasized language -- the exclusionary phrase -- quite clearly excludes from the definition of care and treatment those educational services that are under the jurisdiction of the regents. We believe that the exclusionary phrase was intended to prevent MHRH from duplicating the educational services that are provided through programs under the jurisdiction of the regents. The statute, however, does not define "the jurisdiction of the board of regents." In order to conform with the therapeutic purpose of §§ 40.1-7-1 to -9, we believe that we must construe the jurisdiction of the regents to include those private special education programs which, at public expense, provide the educational services that a school committee, though obliged to provide, is unable to offer because it lacks the requisite facilities or expertise to accommodate the unique needs of

a handicapped child. To rule otherwise could require MHRH to devote a substantial portion of its resources to providing special education services, which would effectively frustrate the therapeutic purpose of the program by decreasing the funds available for providing psychiatric services. Accordingly MHRH is not in the first instance obliged to finance a handicapped child's special education in a private program; that obligation belongs solely to the school committees. What obligation MHRH has to provide educational services is very limited and it complements rather than supplants the obligation of the school committees under § 16-24-1.

The obligation of MHRH to provide special education services arises when the services that the school committee must provide are no longer accessible to an emotionally disturbed child as a consequence of the "psychiatric care and treatment" he is

receiving in the MHRH program. We wish to emphasize that a municipality may not render special education programs "inaccessible" -- thus shifting the responsibility to MHRH -- simply by choosing not to create or to finance them. On the contrary, a school committee must either establish its own programs or provide for achild's special education in a private program. The determinative factor is whether a child's placement and treatment in the MHRH program would deprive him of his access to the existing public or private special education programs or would cause him to be absent from those programs to such an extent that this educational growth and development would be impaired. If either situation occurs, then MHRH must assume the responsibility of educating the child, and this responsibility continues until such time as the child either leaves the MHRH program or is able to resume his education in the program existing under the jurisdiction of the regents.

This construction of § 40.1-7-4(1) ensures that an emotionally disturbed child who no longer has access to either a regular or special education program because of his "psychiatric care and treatment" in the MHRH program will nonetheless not be deprived of his educational opportunities while being treated. The obligation of MHRH to provide special education services is thus very limited. Contrary to the opinion of the associate commissioner, §§ 40.1-7-1 to -9 do not impose on MHRH the responsibility of educating all emotionally handicapped children, nor do they relieve a school committee of its responsibility under § 16-24-1 as the primary provider of special educational services.

It is our opinion, therefore, that the answer to the first question must be in the affirmative.

Another exclusionary phrase nearly identical to the one in the definition of

"care and treatment" appears in § 40.1-7-7, which deals with the contributions that each community must make to MHRH as the community's share of the cost of educational services provided by MHRH to emotionally disturbed children. Prior to July 1, 1979, § 40.1-7-7 had provided:

> "Each community * * * shall contribute to the department, [MHRH] * * * its average per pupil cost for education * * * as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the jurisdiction of the board of regents for education." (Emphasis added).

The second certified question asks us to determine whether "other special education programs," such as the one at Bradley Hospital, are "special education programs under the jurisdictiion of the board of regents," as defined in § 40.1-7-7. In light of our prior construction of "jurisdiction" in § 40.1-7-4(1), it would seem that we should again construe the term to include these pro-

grams. Since the District Court has certified the questions to us, however, the Legislature has amended § 40.1-7-7. The statute now reads:

> "Each community * * * shall contribute to the department, * * * its average per pupil cost for special education * * * as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the control and management of the school committee." G.L. 1956 (1977 Reenactment) § 40.1-7-7 as amended by P.L. 1976, ch. 130, § 4. (Emphasis added).

Because the statute has been amended, what we must now determine is whether the "other special education programs" referred to in the question are "special education programs under the control and management of the school committee." We believe that they are.

It is our opinion that a construction of "control and management" that includes both those programs administered directly by the the school committee as well as those private programs in which the committee has placed

handicapped children is the only construction of the exclusionary phrase that comports with the purpose of § 40.1-7-7. The language of § 40.1-7-7 indicates that the statute has a compensatory purpose. As we stated in answering the first question, the obligation of MHRH to educate a handicapped child arises only after the child has been admitted to the MHRH program and no longer has access to the programs provided by the school committee. To the extent that MHRH then provides educational services for handicapped children, a need for compensation exists because of these occasions MHRH must bear the costs of education that otherwise would have been borne by the school committee, pursuant to G.L. 1956 (1969 Reenactment) §§ 16-24-1 and 16-24-2. Recognizing that there is no need for a community to reimburse MHRH for educational services that the community already provides, the Legislature incorporated into § 40.1-7-7 an exclusionary phrase which relieves a

community of its duty to contribute to MHRH for those educational services offered in programs "under the control and management of * * * [its] school committee." In light of the compensatory nature of the statute, it makes little sense to us to construe "control and management" in such a manner that we would distinguish between special education programs administered directly by the school committee and private special education programs in which the school committee has placed resident handicapped children whose special needs have not been met by the committee's existing programs. From a financial standpoint there is little to differentiate the two types of programs. The school committee must bear the cost of providing a special education regardless of the naure of the program in which the child receives it. In addition, the school committee retains a significant degree of control over the content of the educational

services provided in a private program because the regents' regulations and the Act require that a representative of the committee participate in the formulation of the child's individualized education program.

The central issue in determining whether § 40.1-7-7 applies is whether a community, through its school committee, has paid for the educational services that have been provided to a handicapped child. If it has, then the exclusionary phrase relieves it of is obligation to contribute to MHRH. If the child has received the necessary educational services from the MHRH program, then the exclusionary phrase does not apply and the community must contribute its average-per-pupil cost for special education to MHRH.

We believe that the Legislature amended the exclusionary phrase in § 40.1-7-7 in order to make the statue more precise, not to diminish its scope. An examination of the Act in which the Legislature amended § 40.1-

7-7 shows that the Legislature contemporaneously extended the applicability of the regents' regulations to the educational services offered by MHRH. Public Laws 1976, ch. 130, § 6 (amending G.L. 1956 (1969 Reenactment) § 16-24-2). The replacement of the phrase "jurisdiction of the board of regents" with a more precise phrase was necessary to avoid a construction of the statute that would place MHRH under the jurisdiction of the regents or purposes of § 40.1-7-7 simply because its educational program was subjecct to the regents' regulations. Such a construction of the statute would have brought the MHRH program within the ambit of the exclusionary phrase, resulting in a situation in which the contributions to MHRH, if any, would not reflect the costs incurred by MHRH in providing special educational services to emotionally disturbed children. We will not ascribe such an improbable intent to the

Legislature. Berthiaume v. School Committee of Woonsocket, R.I., 397 A.2d 889, 892 (1979). It is our opinion that the Legislature amended § 40.1-7-7 with the intention of clarifying the somewhat opaque language of the exclusionary phrase. We perceive nothing in the amending act that indicates an intent to affect the obligation of communities to reimburse MHRH for a portion of the costs incurred by that department in providing educational services to emotionally disturbed children. For these reasons, the answer to the second certified question must also be in the affirmative.

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT (SEPT. 16, 1980)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., URSULA J. SMITH, Parents Guardians and Next Friends of Thomas F. Smith, III, and THOMAS F. SMITH, III	:	
VS	:	C.A. No. 76-0510
CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., Associate Rhode Island Commissioner of Education, THOMAS SCHMIDT, Rhode Island Commissioner of Education, THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION, and JOHN E. McMANUS, Director of Rhode Island Department for Children and their Families	:	

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

PREAMBLE

This action arises under the Constitution and laws of the United States, more specifically, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, the

Education of the Handicapped Act (20 U.S.C. § 1401, et seq.), and the Rehabilitation Act of 1973, Section 504 (29 U.S.C. § 794). It is brought to secure to the minor plaintiff his right to a free, appropriate education, suited to his special needs as a handicapped child and his right not to be deprived of said education except by due process of law.

This is an appeal from a final decision of the Rhode Island state education agency which adversely effects the plaintiffs. This Court has subject-matter jurisdiction under 20 U.S.C. §§ 1415(e)(2) and 1415(e)(4) without regard to the amount in controversy.

Administrative remedies having been exhausted, this Court has jurisdiction, over those claims which are based upon discrimination by the defendants against the minor plaintiff because of his handicapping conditions, under 31 U.S.C. §1244.

The amount in controversy exceeds $10,000.00 exlusive of interest and costs.

This Court has subject-matter jurisdiction under 28 U.S.C. §1331. Declaratory relief is proper pursuant to 28 U.S.C. §§2201 and 2202.

Defendants have attempted to deprive the minor plaintiff of rights secured him by the Constitution and laws of the United States under color of Rhode Island law. A cause of action is therefore created by 42 U.S.C. §1983, and jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) without regard to the amount in controversy.

PARTIES

1. Plaintiffs, THOMAS F. SMITH, JR., and URSULA J. SMITH are husband and wife, residents of Cumberland, Rhode Island and parents of Thomas F. Smith, III. THOMAS F. SMITH, III (hereinafter "Tommy") is a minor child, born February 28, 1968, who is and has been at all times mentioned herein, handicapped physically and mentally because of the effects of cerebral palsy which has affected him since birth. He is an "otherwise quali-

fied handicapped individual" as provided in 29 U.S.C. §794. As a result of his handicaps, he has been unable to obtain the advantages and opportunities of education and is in need of "special education" and "related services" as those terms are defined in 20 U.S.C. §§1401(16) and 1401(17), respectively, and in 45 C.F.R. §§121a.14 and 121a.13, respectively.

2. The defendant, CUMBERLAND SCHOOL COMMITTEE, (hereinafter "the School Committee") is the Rhode Island local educational agency (LEA) which is directly responsible for providing special education and related services, without cost, appropriate to Tommy's needs as a handicapped child.

3. The defendant, WILLIAM P. ROBINSON, JR. is the Associate Rhode Island Commissioner of Education, (hereinafter "the Associate Commissioner") and the person who has had, at all times mentioned herein, the responsibility to review decisions of the

LEA's in Rh de Island, and render decisions on behalf of the Rhode Island Department of Education. The Rhode Island Department of Education (hereinafter "the SEA") is the state educational agency for the State of Rhode Island. The Associate Commissioner is an employee of the SEA, with various and sundry duties, other than acting as a hearing officer for appeals regarding matters of special education from the LEA's in Rhode Island.

4. The defendant, THOMAS SCHMIDT, is the Rhode Island Commissioner of Education (hereinafter "the Commissioner") and the person designated by Rhode Island law with the responsibility to hear appeals regarding matters of special education from the LEA's in Rhode Island. He has delegated his responsibility and his attendant powers and duties to the Associate Commissioner.

5. The defendant, RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (hereinafter "the

Board of Regents") is the organ of Rhode Island government which has the power to adopt policies and procedures with regard to the substantive and procedural rights of handicapped children who reside within the State of Rhode Island. It has general supervisory powers over the educational process within the State of Rhode Island and the duty to enforce the provisions of all laws relating to said educational process.

6. The defendant, JOSEPH E. McMANUS, is the Director of the Rhode Island Department for Children and their Families, (hereinafter "DCF") and according to the decision of the Associate Commissioner, the Rhode Island Department of Mental Health, Retardation and Hospitals (MHRH) is responsible for Tommy's education. The program referred to by the Associate Commissioner in his decision was under the aegis of MHRH when said decision was rendered but is currently under the jurisdiction of DCF, having been transferred

there by R.I.P.L. ch248 §1. The said defendant is joined herein so that he may be fully informed and take such part herein as he may desire, so that complete relief may be afforded between the parties, and a multiplicity of actions avoided.

COUNT I

7. By letter dated November 5, 1976, a copy of which is annexed hereto as Exhibit A, the Cumberland Superintendent of Schools informed of Tommy's parents that while he agreed Tommy's placement in a program at Emma Pendleton Bradley Hospital, licensed by the SEA as a special education program for emotionally handicapped children:

> "...provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him."

it was his position that:

> "...his (Tommy's) education and care are the responsibility of the Division (Department) of Mental Health, Retardation and Hospitals." (Now DCF)

8. Plaintiffs timely appealed the Superintendent's decision, pursuant to the applicable provisions of the Board of Regents - Regulations Education Handicapped Children (hereinafter "State Regulations"), to the School Committee, and on January 20, 1977 a hearing was conducted before the said School Committee on the issue of whether the School Committee or MHRH (now DCF) had the responsibility to provide further funding of Tommy's placement in the program at Bradley Hospital.

9. Immediately after the hearing concluded, the School Committee voted unanimously to uphold its Superintendent of Schools and in effect told Tommy and his parents that it had no responsibility to provide him with a free, appropriate education since it felt he was "emotionally disturbed" and therefore the responsibility of MHRH (now DCF).

10. On February 10, 1977, the School Committee rendered a written decision. A

copy of this decision is annexed hereto as Exhibit B.

11. From that decision, plaintiffs appealed to the Commissioner, and the matter was heard de novo by the Associate Commissioner, on November 2, 1977, November 21, 1977, and December 21, 1977.

12. By motion made October 24, 1977, plaintiffs asked the Associate Commissioner to recuse himself since he was not an impartial hearing officer, as required by federal law. A copy of the Motion to Recuse is annexed hereto as Exhibit C. The Associate Commissioner denied plaintiffs' motion by letter dated October 28, 1977, a copy of which is annexed hereto as Exhibit D.

13. The requirement of the State Regulations that plaintiffs submit the controversy between themselves and the School Committee to the School Committee itself, violates plaintiffs' right to a hearing before an impartial tribunal as guaranteed by

the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and 20 U.S.C. § 1415 (formerly 20 U.S.C. §1413(a)(13).

14. The hearing conducted before the Associate Commissioner, likewise denied the plaintiffs procedural due process as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; 20 U.S.C. §1415; and final regulations adopted by the United States Department of Health, Education and Welfare; specifically, 45 C.F.R. §§121a.506, 121a.507, 121a.510 and 121a.512.

15. On April 17, 1978, the Associate Commissioner made a decision on the merits. Plaintiffs received a copy of this decision on April 25, 1978. A copy is annexed hereto as Exhibit E. Said decision is a nullity since the hearing was conducted before the Associate Commissioner and he is a person disqualified by law from hearing such matters

as Tommy's appeal from his LEA. The decision states:

> "...it is the responsibility of MHRH (now DCF) to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH (now DCF) the 'per pupil cost' as its share of the cost of the special educational and related services provided to Thomas."

The Associate Commissioner, in a final footnote to his decision, disposed of Plaintiffs' argument that they cannot be required to contribute to the cost of providing Tommy with an appropriate special education, as would be the case if MHRH (now DCF) were the agency which placed him in the special education program at Bradley Hospital. He noted:

> "The appellants (plaintiffs) have also asserted that they are not required to pay MHRH (now DCF) any amount for the services provided to Thomas. Their argument in this regard is based on various federal statutes and regulations and, ultimately on the Supremacy Clause of the United States Constitution. (Art. VI, Para. 2). This issue, however, is not within our jurisdiction on this appeal."

16. At all times mentioned herein, the State of Rhode Island through the SEA has submitted a State Plan, pursuant to 20 U.S.C. §1413, to the U.S. Office of Education and in return has received federal funds for state administered programs of special education and related services. Each said State Plan has incorporated the State Regulations and therefore, said Regulations become a binding part of the State Plan and are enforceable as part of the federal statutes and regulations relating to education of handicapped children.

WHEREFORE, plaintiffs seek relief as follows:

1. A declaratory judgment that the procedural safeguards contained in Article IX of the State Regulations do not comply with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; the provisions of 20 U.S.C. §1415 and CFR §§121a.506, 121a.507, 121a.510 and 121a.512.

2. A prohibitory injunction against the Commissioner and Associate Commissioner conducting any more hearings in review of decisions of the Rhode Island LEA's until and unless the defendant Board of Regents, adopts regulations which conform in all respects to the requirements of 20 U.S.C. §1415 and Chapter 121a. of Title 45 - Code Federal Regulations.

3. Reasonable attorneys' fees as provided in 42 U.S.C. §1988 and 31 U.S.C. §1244(e).

4. Their costs in this action.

5. Such additional and further relief as the Court deems just in the circumstances of this case.

COUNT II

16. The assertion of the School Committee and the Associate Commissioner of Education that MHRH (now DCF) is responsible for the cost of Tommy's placement in an appropriate educational program is a transparent

attempt, both by the LEA, and the SEA, to avoid responsibility for children such as Tommy for which the LEA cannot provide, within the local school system, an appropriate education. In addition, it violates Tommy's rights under federal and state law to have his LEA provide a free, appropriate educational placement without regard to whether or not said placement can be made within the local school system.

The School Committee has discriminated against Tommy because he has a particular handicapping condition, i.e., emotional disturbance, whereas it has not discriminated against other children with different handicaps. Such discrimination violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution and 29 U.S.C. §794.

17. The decisions of the LEA and the SEA are based solely on fiscal considerations and are not mindful of federal law or Tommy's

urgent need for an appropriate educational placement which provides "special education" and "related services".

18. Unless this Court had previously interceded on Tommy's behalf, and ordered the School Committee to continue funding Tommy's placement, pending exhaustion of state administrative remedies, he would be on the outside looking in while losing the precious benefits he received at Bradley Hospital.

19. The program at Bradley Hospital provided Tommy with only a "special education" and "related services".

20. Because of the special education and related services Tommy received at Bradley Hospital he has progressed to a less restrictive educational environment, namely Harmony Hill School in Chepachet, Rhode Island. The program at Harmony Hill School also provides Tommy with a special education and related services.

21. Despite being handicapped by, among other things, a serious emotional disturbance, Tommy is entitled to a free, appropriate education at the expense of his LEA.

22. The decision of the Associate Commissioner, in addition to being fatally defective because it violates Tommy's procedural due process rights, is erroneous because it is based on a misinterpretation of Rhode Island and federal law.

WHEREFORE, plaintiffs seek relief as follows:

1. Review and reversal of the final decision of the SEA (Exhibit E).

2. A declaratory judgment that the School Committee and not DCF is responsible to provide Tommy a free education appropriate to his special needs as a handicapped child.

3. A mandatory injunction against the School Committee, requiring it to provide a free education to Tommy, appropriate to his special needs as a handicapped child.

4. Reasonable attorney's fees as provided in 42 U.S.C. §1988 and 31 U.S.C. §1244(e).

5. Their costs in this action.

6. Such additional and further relief as the Court deems just in the circumstances of this case.

THOMAS F. SMITH, JR.
URSULA J. SMITH,
Parents, Guardians and Next
Friends of Thomas F. Smith, III,
THOMAS F. SMITH, III.
By their attorneys,
OSTER, GROFF & PRESCOTT
936 Smithfield Avenue
Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

Dated September 16, 1980

[Certificate of Service omitted in printing]

[Exhibits A-E omitted in printing]

ANSWER OF STATE DEFENDANTS WILLIAM ROBINSON, THOMAS SCHMIDT, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (SEPT.30, 1980)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing]

ANSWER OF WILLIAM P. ROBINSON JR., ASSOCIATE RHODE ISLAND COMMISSIONER OF EDUCATION, THOMAS SCHMIDT, RHODE ISLAND COMMISSIONER OF EDUCATION, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION

FIRST DEFENSE

The complaint fails to state claim upon which relief can be granted.

SECOND DEFENSE

Defendants possess immunity and good faith immunity.

THIRD DEFENSE

Plaintiffs have failed to exhaust their administrative remedies.

FOURTH DEFENSE

Defendants admit the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 10, 11, and 12 of the complaint. Defendants admit paragraph 3 of the complaint except that they deny that Commissioner Robinson has other duties. Defendants deny the allegations contained in paragraphs 13, 14, 15, 16 (II), and 17 of the complaint, defendants aver that they are without sufficient information to form a belief as to the validity of the allegations contained in paragraphs 9, 19, and 20 of the complaint. Paragraphs 16 (I), 18, 21, and 22 of the complaint are conclusions of law to which no answer need be made but to the extent these paragraphs are deemed to include allegations of fact they are denied.

WHEREFORE, defendants demand judgement in their favor and their costs.

State Party Defendants

By Their Attorney

/s/
Forrest L. Avila
Legal Counsel to the
Commissioner of Education

[Certificate of Service omitted in printing]

ORDER: FINDINGS OF FACT, DECLARATION OF PLAINTIFFS' RIGHTS, ENTRY OF PERMANENT INJUNCTION, APPROVAL OF PARTIAL AWARD OF ATTORNEYS FEES, AND RECOGNITION OF PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS FOR ATTORNEYS FEES (JAN. 12, 1981)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR, et als	:	
	:	
-vs-	:	C.A. No.
	:	76-0510
CUMBERLAND SCHOOL COMMITTEE, et als	:	

ORDER

The Court having had the benefit of conferences with counsel for all parties in interest, and the answers of the Rhode Island Supreme Court to the two (2) questions certified in this matter to said court, by agreement between counsel for the plaintiffs and the defendant, Cumberland School Committee, the Court makes the following:

FINDINGS OF FACT

1. The minor plaintiff, Thomas F. Smith, III, (hereinafter sometimes

"Tommy") is a multihandicapped child within the meaning of federal and Rhode Island law.

2. Tommy is in need of "special education" and "related services" as defined in both federal and Rhode Island law.

3. Tommy resides with his parents in Cumberland, Rhode Island and currently attends Harmony Hill School in Glocester, Rhode Island. All of the services provided Tommy at Harmony Hill School are included within the definitions of "special education" and "related services" referred to in paragraph 2. above.

4. The defendant, Cumberland School Committee is a "local educational agency" as defined by federal law and receives federal funds for education of handicapped children.

5. Harmony Hill School is a facility whose program is licensed as a special education program by the Rhode Island Commissioner of Education.

Upon consideration of the foregoing findings of fact and applicable federal statutes and regulations the Court makes the following declaration of plaintiffs' rights;

1. Thomas F. Smith, III is entitled to a free, appropriate special education and related services.
2. The Cumberland School Committee is responsible for providing Tommy with a free, appropriate special education and related services.
3. Tommy is entitled to have the full cost of his attendance at Harmony Hill School paid by the Cumberland School Committee.
4. Tommy is entitled to the benefit of all the procedural safeguards con-

tained in 20 U.S.C. § 1415 and 45 C.F.R. §§ 121a.500 et seq in any contest over his participation in, the continued appropriateness of, or any proposed change in, his placement in the special education program at Harmony Hill School and any and all other special education programs in which he may be enrolled in the future.

The Court hereby permanently enjoins the defendant, Cumberland School Committee, its officers, agents, servants and employees and all persons in active concert with them to fully and faithfully provide Thomas F. Smith, III and his parents with the substantive and procedual [sic] rights to which they are entitled as set forth above.

To the extent the plaintiffs' substantive and procedual [sic] rights as set forth in the above declaration of rights are inconsistent with or contrary to the decision

of the Rhode Island Commissioner of Education in this matter, dated April 17, 1978, the same is hereby reversed and vacated.

Plaintiffs' counsel, George M. Prescott, Esquire, is hereby awarded a counsel fee pursuant to 42 U.S.C. § 1988 and 31 U.S.C. § 1244(e) in the amount of $8,000.00.

This order is entered by agreement between the plaintiffs and the defendant, Cumberland School Committee and is without prejudice to the plaintiffs' claims against the other defendants, including their claims for additional counsel fees.

Enter: /s/ Raymond J. Pettine
Chief Judge 1/12/81

Assented to as to form and substance
/s/ George M. Prescott
Counsel for the Plaintiffs

/s/ James M. Shannahan
Counsel for the defendant,
Cumberland School Committee

MEMORANDUM AND ORDER: DENIAL OF THE STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF A CAUSE OF ACTION AND ON GROUNDS OF IMMUNITY (JUNE 4, 1981)

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR. et al.	)	
	)	
v.	)	Civil Action
	)	No. 76-0510
CUMBERLAND SCHOOL COMMITTEE, et al.	)	
	)	

MEMORANDUM AND ORDER

The facts of this seemingly interminable case have been set out in prior opinions of this Court, see Opinion issued December 22, 1978, and the Supreme Court of Rhode Island, see -- R.I. -- , 415 A.2d 168 (1980). They need not be repeated here. The State defendants -- the Associate Commissioner of Education, the Commissioner of Education, the Board of Regents, and the Director of the Department of Mental Health, Retardation, and

Hospitals -- have moved to dismiss on divers grounds. For the reasons given below, this motion is denied.

1. The Source of Plaintiffs' Cause of Action

The Supreme Court has once again declined to decide whether §504 of the Rehabilitation Act supports a private right of action. See University of Texas v. Camenisch, 49 U.S.L.W. 4468 (April 29, 1981). The State reiterates its position that no such cause of action exists. The Court believes it unnecessary to decide this question after Maine v. Thiboutot, 48 U.S.L.W. 4859 (June 25, 1980). In that case, the Supreme Court held that § 1983 encompasses deprivations of rights afforded by even those federal statutes not directly concerned with civil liberties. Although the interplay between this holding and the whole private-right-of-action analysis remains to be explored, it seems fairly certain that

handicapped children have some enforceable "rights" under the Rehabilitation Act--that is, that the statute was enacted for their especial benefit--in the same way that the welfare recipients in Thiboutot have "rights" under the Social Security Act.

In any event, and perhaps more to the point, this Court has already held, in an opinion issued January 17, 1977, that §1983 affords the plaintiffs a cause of action here. Manifestly, this is now the law of the case.

2. Possible Judicial or Legislative Immunities of the Defendant State Officials

The State argues that, because defendants Associate Commissioner of Education and Commissioner of Education were acting in a judicial capcity when they sustained the Cumberland School Committee's decision not to fund Tommy's special schooling, they are entitled to judicial immunity. It argues in addition that all the state defendants are

shielded by legislative immunity to the extent that plaintiffs' complaint concerns legislative acts such as the promulgation of regulations.

The State's argument is inapposite to this case. The defendant officials are not being sued in their individual capacities for damages. Cf. Lake Country Estates, Inc. v. Tahoe Planning Agency, 440 U.S. 391 (1979); Pierson v. Ray, 386 U.S. 547 (1967) (in both, officials sued for damages). Rather, plaintiffs are seeking declaratory and injunctive relief from certain official policies and practices they claim violate federal constitutional and statutory mandates. The officials are named defendants only so that plaintiffs might take advantage of the procedure approved in Ex parte Young, 209 U.S. 123 (1908), for raising federal law challenges to state statutes and regulations. Plaintiffs have properly alleged that these officials are responsible for the formulation and

implementation of educational policies and procedures in the State. Thus, these officials have sufficient connection with the challenged decisions and practices to serve as stand-ins for the State itself. Shell Oil Co. v. Noel, 608 F.2d 208, 211-12 (1st Cir. 1979). In such a case, where there is no attempt to hold the defendants personally liable in damages for acts taken as part of their official duties, the shield of immunity is neither available nor necessary.[1/] See Pence v. Rosenquist, 573 F.2d 395, 398 (7th Cir. 1978); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1366 (9th Cir. 1977), rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Planning Agency, 440 U.S. 391 (1979); Maria Santiago v. Corporacion de Renovacion Urbana y Vivienda, 544 F.2d 1210, 1212-13 (1st Cir. 1977); Littleton v. Berbling, 468 F.2d 389, 406-08 (7th Cir. 1972) & cases therein cited, rev'd on other grounds sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974).

3. Power of the State Defendants to Affect the Decision of the Cumberland School Committee

The State's most vigorous argument in favor of dismissal asserts in substance that the defendant officials had no power to force the Cumberland School Committee to abandon the legal position it had taken with respect to funding Tommy's schooling; therefore, it argues, they cannot be held responsible in a subsequent court action challenging the legality of the position. With respect, the Court simply does not understand how the State can seriously propound this argument.

Certainly it is true, as the State points out, that the Cumberland School Committee is empowered by statute to exercise "the entire care, control, and management" of the local public schools. See R.I.G.L. §16-2-18. This legislative mandate establishes the school committee as "the most important forum in the administrative hierarchy" of public education in the state. McSally v.

Board of Regents, ___ R.I. ___, 401 A.2d 438, 440 (1979). What the State inexplicably fails to note, however, is that the School Committee's power, though plenary, is not absolute:

> Any person aggrieved by any decision or doings of any school committee or in any other matter arising under any law relating to schools or education may appeal to the commissioner of education who, after notice to the parties interested of the time and place of hearing, shall examine and decide the same without cost to the parties involved.

R.I.G.L. §16-39-2. See R.I.G.L. 16-1-5(j). In such cases, the Commissioner has broad powers to dispose of the matter. McSally v. Board of Regents, ___ R.I. at __, 401 A.2d at 440; School Commission v. State Board of Education, 103 R.I. 359, 364, 237 A.2d 713, 716 (1968). He may consider the case de novo, taking evidence and substituting his judgment for that of the school committee. See School Committee v. State Board of Education, 103 R.I. at 363-64,

237 A.2d at 716-17. The resulting decision is not merely an advisory opinion. The Commissioner may direct the School Committee to take certain actions and, if necessary, obtain a writ of mandamus to compel compliance. See Randall v. Wetherell, 2 R.I. 120, 122 (1852). Ultimately, the Board of Regents reviews his decision. See R.I.G.L. §§16-39-3; 16-49-1; 16-49-4(9).

Thus the Court is at a loss to understand the State's argument that the Department of Education through its head, the Commissioner, lacks "the executive authority to compel a local school committee, by executive fiat, to abandon a legal position which a local school committee has adopted in an individual case." Memorandum at 1. Perhaps the mechanism for exerting control is not "executive fiat", but this is hardly fatal to plaintiffs' case. Their complaint against the Commissioner and Associate Commissioner is not that these officials failed to fulfill

some overarching duty to correct, spontaneously and on their own motion, an erroneous action of a school committee. Rather, plaintiffs pursued the statutory review procedure and received from these very officials an unfavorable ruling. The Associate Commissioner held a hearing and, after making findings of fact and conclusions of law, sustained the school committee's position. See Decision of April 17, 1978, appended to plaintiffs' Second Amended Complaint. This decision was duly approved by the Commissioner. See id. at 15. According to the Rhode Island statutory and decisional law discussed above, the Commissioner, or his designee, could indeed, as a result of plaintiffs' appeal, have ordered "the local school system to drop a legal position which the school committee felt was justifiable." Defendant's Memorandum at 2. Instead, he sanctioned the Cumberland School Committee's interpretation of Rhode Island law, endorsing

it as the official policy that governed plaintiffs' case.

The Court can to some extent sympathize with the State's complaint that it (through the presence of its officials as defendants) is being held responsible for a legal position which it actively opposed when the decisive state law question was subsequently submitted on certification to the Rhode Island Supreme Court. However, even though the State ultimately sided with plaintiffs against the Cumberland School Committee, the fact remains that the Commissioner of Education--the highest official within the Department of Education--had rendered through his designee a binding decision that aggrieved them. The state defendants had the power and the opportunity to satisfy plaintiffs' grievance. That their refusal to do so was made in good faith and with colorable support in existing law is irrelevant to whether they are properly included in the complaint as

responsible for official acts and policies that allegedly violated plaintiffs' federal rights.[2/]

Accordingly, the motion to dismiss the defendant State officials is hereby denied.

So ordered.

* * *

Enter:

/s/ Raymond J. Pettine
Chief Judge

June 3, 1981

FOOTNOTES

1/ Similarly, there appears little doubt that any award of attorney's fees that might be made against the State defendants in this case would be assessed against them in their official capacity, to be paid from official funds. See Hutto v. Finney, 437 U.S. 678, 699-700 (1978).

2/ Again, the Court emphasizes that there is no claim here that the Commissioner or Associate Commissioner is personally liable in damages. Thus, good faith immunity plays no part in this case.

ORDER: DECLARATION OF PLAINTIFFS' RIGHTS AS TO THE ENTITLEMENT OF PLAINTIFF THOMAS F. SMITH III TO A FREE APPROPRIATE EDUCATION, AND DIRECTION WITH REGARD TO MOVING FOR AN AWARD OF ATTORNEYS FEES (JUNE 4, 1981)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et als	)	
	)	
v.	)	C.A. No.
	)	76-0510
CUMBERLAND SCHOOL COMMITTEE, et als	)	
	)	

O R D E R

The court having considered the record of the proceedings before the Associate Rhode Island Commissioner of Education which were held on November 2, 21 and December 21, 1977; the parties having submitted the case for decision upon said record alone, waiving their rights under 20 USC §1415(a)(2) to present further evidence; and having the benefit of answers to two (2) questions of

law certified to the Rhode Island Supreme Court, the court makes the following:

FINDINGS OF FACTS

1. The minor plaintiff, Thomas F. Smith, III, (hereinafter sometimes "Tommy") is a multihandicapped child within the meaning of federal and Rhode Island law.

2. Tommy is in need of "special education" and "related services" as defined in both federal and Rhode Island law.

3. Tommy resides with his parents in Cumberland, Rhode Island and currently attends Harmony Hill School in Glocester, Rhode Island. All of the services provided Tommy at Harmony Hill School are included within the definitions of "special education" and "related services" referred to in paragraph 2 above.

4. At all times relevant to this action, Tommy has attended special education programs under the jurisdiction of the defendant, Rhode Island Board of Regents for Education, the same being licensed by the defendant, Rhode Island Commissioner of Education.

Upon consideration of the foregoing findings of fact, and in light of applicable federal and state statutes and regulations, the Court makes the following declaration of plaintiffs' rights:

1. Thomas F. Smith, III is entitled to a free, appropriate special education and related services.

2. In accordance with the Rhode Island Supreme Court's opinion in Smith v. Cumberland School Committee, -- R.I. --, 415 A.2d 168 (1980), Tommy is entitled to have the full cost of said special education and

related services paid by the Cumberland School Committee so long as he is of qualifying age and resides in the Cumberland School District.

3. The decision of the Cumberland School Committee rendered on February 10, 1977 is contrary to the preceding delcaration number "2"; it therefore cannot be deemed an accurate and controlling statement of the rights and obligations of the parties with respect to Tommy's education.

4. The decision of the Associate Commissioner of Education rendered on April 17, 1978 and approved by the Commissioner of Education, which affirmed the decision of the Cumberland School Committee, is also contrary to the preceding declaration numbered "2"; it therefore

cannot be deemed an accurate and controlling statement of the rights and obligations of the parties with respect to Tommy's education.

It having been established that Thomas Smith III was, and is, entitled to be educated at the cost of the Cumberland School Committee as a matter of state law, plaintiffs have obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims.

The entry of this order resolves all issues in this case with the exception of the question of attorney's fees. Plaintiffs are hereby given fourteen days to move for an award of fees if they intend to do so.

* * *

Enter:

/s/ Raymond J. Pettine
Chief Judge

June 3, 1981

PLAINTIFFS' MOTION FOR AN AWARD OF FEES AND OTHER COSTS (JUNE 23, 1981)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR. et als	:	
	:	
-vs-	:	C.A. No.
	)	76-0510
CUMBERLAND SCHOOL COMMITTEE,	:	
et als	:	

PLAINTIFFS' MOTION FOR AN AWARD OF FEES AND OTHER COSTS

Now come the plaintiffs, in the above entitled cause and move the court to award their counsel a fee, and for payment of their other costs, in the total amount of $31,790.73 against the defendants; Associate R.I. Commissioner of Education, William P. Robinson, Jr.; R.I. Commissioner of Education, Thomas P. Schmidt, and his successor in office; and the Rhode Island Board of Regents for Education.

Thomas F. Smith, Jr., et als
By their attorneys,
OSTER, GROFF & PRESCOTT
936 Smithfield Avenue

Lincoln, Rhode Island 02865

June 23, 1981

/s/
GEORGE M. PRESCOTT

[Certificate of Service omitted in printing]

OPINION: ORAL DECISION FROM THE BENCH AWARDING ATTORNEYS FEES (APR. 30, 1982)

[The district court's Oral Decision is set forth in the Appendix to the Petition for Certiorari at A. 31 through A. 58.]

ORDER: AMENDMENT OF THE FEE AWARD, AND DIRECTION FOR PREPARATION OF A FINAL ORDER (JUNE 5, 1982)

[This Order and its attachments are set forth in the Appendix to the Petition for Certiorari at A. 24 through A. 30.]

ORDER: FINAL ORDER DIRECTING THE STATE DEFENDANTS TO PAY FEES AND COSTS TO PLAINTIFFS' LAWYER (JUNE 11, 1982)

[The district court's Final Order is set forth in the Appendix to the Petition for Certiorari at A. 22 to A. 23.]

OPINION AND JUDGMENT OF THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT: REVERSAL OF THE DISTRICT COURT'S AWARD OF ATTORNEYS FEES (MAR. 24, 1983)

[The court of appeals' Opinion and Judgment are set forth in the Appendix to the Petition for Certiorari at A. 1 through A. 21.]

ORDER OF THE U.S. SUPREME COURT GRANTING THE WRIT OF CERTIORARI (OCT. 31, 1983)

SUPREME COURT OF THE UNITED STATES

No. 82-2120

Thomas F. Smith, Jr., et al.,

Petitioners,

v.

William P. Robinson, Jr., Rhode Island Associate Commissioner of Education, et al.

ORDER ALLOWING CERTIORARI. Filed October 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.